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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Asha Bibi .. Appellant*
v. (2nd Deft.)
P. N. Kadir Ibrahim Rowther .. Respondent
(*Plaintiff*).

Asha Bibi v. Kadir Ibrahim Rowther.

Mahomedan Law—Marriage—Husband and wife, relation between—Divorce—Essentials—"Talak," meaning of—Sureeh and Kinayah, distinction between—Hamilton's Hedaya, authority of.

Marriage among the Mahomedans is in its constitution a contract, and it is open to a man or woman entering upon marriage to define their future marital rights and liabilities *inter se* so as to considerably modify the rights and obligations that ordinarily flow from a valid marriage.

The husband has an absolute right to dissolve the marriage, and the only condition for a valid exercise of such a right is that he must be a major and of sound mind at the time. The wife's consent or absence of consent is immaterial, and the words of repudiation need not be direct in form, nor need they be addressed in the wife's presence.

Marriage and its incidents and connotation and the rights and obligations *inter se* between husband and wife under Mahomedan Law explained.

Sureeh (express) and Kinayah (ambiguous) forms of divorce distinguished and their legal incidents pointed out.

The word "Talak" and its meaning pointed out.

The authority of Hamilton's *Hedaya* as to how far it can be taken as a correct exposition of the Mahomedan Law pointed out. [*Furzund Hossein* v. *Janu Bibee*[1] dissented from.]

Second Appeal from the decree of the District Court of Trichinopoly in A. S. No. 154 of 1907, presented against the decree of the Court of the District Munsif of Srirangam in O. S. No. 199 of 1906.

S. Srinivasa Aiengar and *K. V. Krishnaswami Aiyar* for appellant-2nd defendant.

The Advocate-General (*P. S. Sivaswami Aiyar*) for respondent-plaintiff.

S. Srinivasa Aiengar.—Plaintiff sued his wife, the appellant, for restitution of conjugal rights. The defences were that

* S. A. No. 896 of 1906. 3rd September 1909.

1. (1878) I.L.R. 4 C. 588.

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there was a divorce and that the husband treated the wife with cruelty. The Judge has found that there was no divorce and no cruelty, and has therefore given the plaintiff a decree. I submit that there was a divorce and that the Judge's view, that since the words of divorce were not addressed to the wife directly there was no legal divorce, is wrong. The Judge refers to *Furzund Hossein* v. *Janu Bibi*[1] for his position. I submit that the words need not be addressed to the wife direct—Ameer Ali's *Mahomedan Law*, Vol. II, S. 3 of Chap. XII, p. 425; Bailie's *Digest*, (1865 Edn.) p.p. 214. 215, 216; *Sarabai* v. *Rabiabai*[2]; *Ful Chand* v. *Nazal Ali*.[3] The amount of cruelty found is sufficient to dismiss the suit. What is sufficient in Mahomedan Law is sufficient in Hindu Law—*Buzloor Rahim* v. *Shumsoonnissa*[4]. Cruelty endangering health or life is sufficient. Even legal cruelty is not necessary. Anything falling short of it will be sufficient if there are other circumstances to show that it would not be to the benefit of the wife to have restitution — *Buzloor Raheem* v. *Shumsoonnissa*[4]; *Husaini Begum* v. *Mahomed Rustam Ali Khan*.[5] The Court has got a discretion in such matters, vide Order XXI, R. 33, C.P.C. What constitutes legal cruelty is a question of law—*Dular Koer* v. *Dwaraka Nath Misser*.[6] It is only if the husband wants restitution *bona fide* the Court will give him a decree. In this case the husband really wants to get at the wife's jewels. The facts found are beating and kicking and the husband's keeping a concubine. The husband's father who is with him is in inimical terms with the wife's father. It is only 4 months after the wife sued for dower that the husband sued for restitution. Even insults unjustly showered upon the wife are a sufficient bar to granting a decree. The husband can be put upon terms. The question is not purely one of Mahomedan law. Though the marriage laws of the parties may be entirely based upon Mahomedan law the question of restitution is one of justice, equity and good conscience—*Paigi* v. *Sheonarain*.[7] [The Vakil then dwelt on

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1. (1878) I.L.R. 4. C. 588, 590.
2. (1905) I.L.R. 30 B. 537.
3. (1908) I.L.R. 36 C. 184.
4. (1867) 11 M I.A. 551, pp. 661, 615.
5. (1906) I.L.R. 29 A. 222, 226.
6. (1905) I.L.R. 34 C. 971, 974.
7. (1885) I.L.R. 8 A. 78.

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the evidence to support the pronouncement of *talak* and about 'cruelty.']

The Advocate-General—discussed the evidence as to the pronouncement of *talak*, as the Judges wanted to give a finding on the point. A *talak* must be either addressed to the wife direct, or it must be communicated to the wife. In the absence of either of these there is no valid *talak*. That is how I distinguish the cases cited by the appellant. A mere mental resolve to divorce is insufficient. There must be some overt acts to make the wife know of the divorce. The only thing that was done in this case is that there was some abuse against the wife's father. *Furzund Hossein* v. *Janu Bibi*[1] is directly in my favour. The finding of the lower appellate Court is that there was no such cruelty as would endanger health, life or safety. The wife who complains of cruelty is not a witness in the case. Restitution, in the case of Mahomedans, must, as with marriage, be governed by Mahomedan law. The Civil Courts Act governs the subject. The fact that the husband beat his wife on three occasions will not constitute cruelty on his part. The husband has admittedly a house of his own. He is not bound to provide her with a separate house. Keeping a concubine, even if true, is not a matter which entitles a wife to live away from her husband. It is not alleged that the concubine is kept in the husband's house. That ought not to be a ground for refusing restitution.

Srinivasa Aiengar replied on the facts and quoted *Sherif Sahib* v. *Usana Bibi*[2] to show that there need not be a communication to the wife as to *talak*. *Talak* is a unilateral act of the husband, and does not require the wife's consent. Even separate residence will have to be given to the wife in case it is necessary under the circumstances—*Buzloor Raheem* v. *Shumsoonissa*[3].

The Court delivered the following

JUDGMENT.—One of the defences of the appellant as defendant in a suit for restitution of conjugal rights was that she had been divorced in the irrevocable form by the respondent (plaintiff in the suit) by pronouncement of *Talak* three times on the 9th January 1906, that is, some time before the institution of the suit.

1 (1878) I.L.R. 4 C. 588. 2. (1871) 6 M.H.C.R. 452.
3. (1867) 11 M.I.A. 551.

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The District Munsif believed the evidence adduced on behalf of the defendant on the point, but the District Judge in appeal did not come to a finding on the question whether Talak was in fact pronounced as alleged, but, being of opinion that the words of repudiation must be addressed to the wife, held that as in the present case Talak is not shewn to have been addressed to the defendant it would not be effective to dissolve the marriage. We have considered the evidence as to repudiation for ourselves and we think that the Munsif's conclusion that the respondent pronounced Talak three times is supported by evidence and the probabilities of the case. The words which the respondent actually used were "Oh, Naina Mahamad Rowther! It is 4 or 4½ years since I married your daughter. You have now brought her away. This is the Talaku for your daughter. This is the Talaku for your daughter. This is the Talaku for your daughter. Talaku once, Talaku twice, Talaku thrice, Muttalaku. Hereafter you may marry your daughter yourself or marry her to a Pallan. She has become my mother."

We have no doubt that the District Judge, in holding that these words did not effectuate a divorce because they were addressed to the defendant's father although they undoubtedly referred to the defendant, took an erroneous view of the Hanafi Law which is the law of both the parties on the subject. According to the principles of that Law the husband, as we shall see, has an absolute right to dissolve the marriage, and the only condition for a valid exercise of such a right is that he must be major and of sound mind at the time. The wife's consent or absence of consent to the action of her husband is immaterial and there is nothing therefore in the reason of the law why in order that a divorce pronounced by a husband should be valid the words of repudiation should be addressed to or uttered in presence of the wife. All that the law requires is that the words should refer to the wife though if they be not communicated to her at the time a question may possibly arise as to whether she is not entitled until she comes to know of the divorce to bind her husband by certain acts such as pledging his credit for obtaining the means of subsistence. That the law on the point is as we have stated will be easily intelligible if we bear in mind the theory and the principles which constitute the Mahomedan conception of

marriage as a legal institution. In Tawzih (Cal. Ed. page 71) marriage is described as "a contract which has been legalised for manifold objects such as preservation of the species, the fixing of descent, restraining men from debauchery and the encouragement of chastity, promotion of love and union between the husband and the wife and of mutual help in earning livelihood." Marriage is regarded as a contract (*aqd*), for no such relations as those connoted by marriage can be established between two members of the opposite sexes except by their voluntary action. In the case of minors, persons recognised by the law as guardians or curators for this purpose are authorised, subject to certain important conditions and restrictions, to enter into the contract on the minors' behalf. Marriage differs, however, from other contracts in one important respect; it cannot according to the Sunni law be expressed to be limited for a period of time.

As incident to a valid marriage the law imports certain rights and obligations *inter se* between the parties. The theory on which such marital rights and obligations are based is that the wife upon marriage surrenders her further marital freedom and the husband acquires a right to her connubial services (*mutât*) in consideration of certain obligations mostly of a pecuniary character incurred by him. Hence the husband is spoken of in the books as the owner, as it were, of her conjugal services, to secure which he is entitled to exercise over the wife a certain amount of personal authority and control. The wife has also a right to the conjugal society of the husband during the continuance of the marriage, but it cannot be said to be of the same absolute character as the corresponding right of the husband. The husband does not by marriage lose his further marital liberty, though the law, for reasons of policy, has restricted that liberty to his having four wives at one and the same time. Neither of the parties to a marriage acquires a right to or power over the property of the other, but on the death of one partner the survivor takes a specified share of the inheritance as an heir. The obligation of the husband consists mainly in his being made responsible for the maintenance of the wife and of the children born of the marriage according to his status in life, and he is further bound to make a certain settlement of money or property called *mahr* or dower on the wife. In case he has more

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than one wife his dealings with them all must be on a strictly just and impartial basis.

The authority with which the husband is armed over the wife is of a disciplinary nature and gives him the power to control her liberty of movement and in cases of flagrant misbehaviour and disobedience, even to inflict corporal chastisement on her, provided the exercise of his authority does not in any case infringe her right to the safety of life, limb or health, nor amounts to cruelty such as by depriving her of social relations with her own people. The right to domestic authority is conceded to the husband rather than to the wife in consideration as hinted above of the pecuniary burden imposed upon the husband and also because of the presumed superiority of the male sex in judgment and discretion. For the same reasons the husband is recognised as having an absolute right to put an end to the marriage by his private act. No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the Prophet (*Hadith*) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband. Upon divorce being pronounced the wife becomes at once entitled to be paid her dower, unless it has been paid before, and after a certain period of probation she is free to marry again. In addition to the husband's right to dissolve the marriage whenever he chooses, in certain cases such as that of the physical incapacity of the husband or the wife and of improper marriages contracted by the guardian of a minor the aggrieved party may ask the Court to annul or set aside the marriage.

These are the ordinary incidents of a Mahomedan marriage; but as marriage among the Mahomedans is in its constitution a contract, it is open to a man and a woman entering upon marriage to define their future marital rights and liabilities *inter se* so as to considerably modify the rights and obligations that ordinarily flow from a valid marriage. For instance the wife may protect herself if she so chooses by stipulation made either before or after marriage to the effect—it is not necessary to consider here the exact form in which such stipulations may be made—

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that the husband shall not exercise such control over her liberty of movement as the law otherwise vests in him or that he shall not take to himself another wife. The husband may, on the other hand, by especial stipulation free himself from liability to maintain the wife who may also release her right to the dower or they may agree that non-payment of the dower shall not be a bar to the exercise of his marital rights. In some parts of India stipulations for the protection of the wife such as have been mentioned are of common occurrence at the time of marriage, but almost all over India generally protection of the wife against an improper exercise by the husband not only of his marital authority but also of his power to dissolve the marriage is for all practical purposes secured by fixing the dower payable to the wife at an amount quite out of proportion to the means of the husband. However that may be, the husband always has a right to dissolve the marriage at his discretion, whatever be the consequences he may have to face.

The learned District Judge has cited Baillie's Digest and a decision of the Calcutta High Court in *Furzund Hossein* v. *Janu Bibee*[1] as authority for his proposition that the words of Talak in order to be effective in law must be addressed to the wife. He does not, however, mention the passage he relies on in Baillie's Digest but presumably he relies on the passage cited in *Furzund Hoossein* v. *Janu Bibee*[2] and other passages of a similar significance. It has been urged by the learned Vakil for the appellant that this decision is not an authority for the view propounded by the District Judge. It is not quite easy to ascertain the exact nature of the proposition intended to be laid down there by *Mitter* and *McLean* JJ., but their decision, having regard to the facts of that case, seems to involve two propositions, that the Mahomedan law has prescribed certain formulæ for divorce which must be strictly observed if the divorce is in the Sureeh or express form and that the direct form of speech is of the essence of those formulæ. We are unable to assent to either of those propositions. The learned Judges quote from Hamilton's *Hedaya* the passage "Talak Sureeh or express divorce is where a husband delivers the sentence in direct or simple terms as if he were to say 'I have

1. (1878) I. L. R. 4 C. p. 588. 2. *Ibid*, p. 591.

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divorced you' or 'you are divorced', which effects a Talak Rijai or "divorce reversible" as an authority for this view of the law. *Hedaya* itself is undoubtedly a book of supreme authority on Hanafi law, and if it has laid down that a Sureeh or express divorce to be effective must be couched in the direct form of speech, as Hamilton is understood to suggest, one would feel the greatest hesitation in holding the law to be otherwise. But *Hedaya* lays down no such proposition which, as we have pointed out, would be inconsistent with the principles governing the Mahomedan law of divorce. At the beginning of the Chapter in which the question as to how divorce may be effected is considered, the passage in the original literally translated would run thus:— 'Divorce is of two kinds, Sureeh (usually translated as express) and Kinayah (usually translated as ambiguous). Sureeh or express divorce is in his words (*i. e.*, is constituted by words of the husband) 'Thou art Tâliqun' (or divorced) and Mutallaqatun (another combination of the root letters t, l and q also meaning divorced) 'I have divorced thee'. With these a reversible divorce is effected, because these words are used in divorce (*i. e.*, in pronouncing divorce) and are not used in others (*i. e.*, other connections) and are therefore Sureeh, and reversibility is attached on the authority of the text (meaning a passage in the Koran). "And it does not require Kiyat (*i. e.*, proof of intention to use the word in the sense of divorce) because it is express in that connection by reason of preponderance of usage." In plain English, what is meant is that divorce may be effected either by use of words which are regarded in law as Sureeh or explicit such as 'I have divorced thee' etc., or by words of equivocal meaning technically called Kinayah. If the words which the law regards as clearly and explicitly meaning dissolution of the marriage tie by the husband have by usage acquired that meaning such as the different forms of the word Talak, then it is not necessary to prove that the husband by using such an expression meant to convey divorce. In Mahomadan jurisprudence the distinction between Sureeh and Kinayah is this : when a person expresses his legal act whether it be a contract, release of rights or dissolution of legal relations in spoken words the meaning of which is unmistakable either because the expressions used have acquired a particular significance by long usage or otherwise

the law will take him to mean what his words convey and will neither permit him to say that he meant something else nor entertain such a question at all. When, on the other hand, the language used is ambiguous, it is open to the person using it to say what he meant and the circumstances may be taken into account to ascertain his meaning (See Tawzib, Cal. Ed., p. 110 and Talwit, Constantinople Ed., pp. 137-9 and Fatawa Alamgiri; Bulaq Ed., Vol. I., p. 374). This rule, it may be observed, is not without a parallel in the rules of the English law regarding the interpretation of deeds. The word Talak or rather the different formations of the root letters t, l and q, has acquired a clear and definite meaning as denoting dissolution of the marriage tie by declaration of the husband. It is not only used in that sense in the Koran and the sayings of the Prophet but habitually by the people as a matter of usage although its root meaning is "setting free" or "letting loose." Hence in law the word Talak and its variations are regarded as having the force of a Sureeh expression so that when a man uses the expression with reference to his wife he cannot afterwards be allowed to say that he meant not divorce but something else. On the other hand, if a man were, for instance, to say to his wife "Thou art not my wife" or "I am not thy husband," or on being asked by a third person "hast thou a wife" answers "no" there would be no divorce unless he meant it (See Fatawa Alamgiri; Bulaq Ed., Vol. I, p. 375). This is all that is meant by the express (Sureeh) or ambiguous (Kinayah) forms of divorce and nothing turns upon the direct or indirect form of speech. If, therefore, when Mr. Hamilton speaks of direct and simple words he means thereby that the words of divorce in order to be Sureeh or express must be addressed to the wife, then he is laying down a proposition for which there is really no warrant in the *Hedaya* or any other authoritative writing on Mahomadan law or in the principles of the Mahomadan law of divorce. Mr. Hamilton's *Hedaya*, as is well known, is not a translation of the original Hedaya in Arabic, but of a certain commentary of it prepared in Persian especially for the use of Mr. Hamilton, who apparently was unfamiliar with Arabic, by certain Moulvies of Calcutta. This Persian commentary is not ordinarily available and is seldom, if ever, used among the Mahomadans nor ever

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referred to as an authority. Mr. Hamilton's translation of it has, however, found vogue in the Courts and is constantly relied on as authority on questions of Hanafi law, though often under the wrong impression that it is a translation of the *Hedaya* itself. But no statement in Mr. Hamilton's book which is not to be found in the original *Hedaya* can be accepted as an authoritative exposition of the Mahomadan law on a particular point unless it agrees with the principles of that law or with what is laid down by well-known Mahomedan Jurists of authority on the subject.

The next question to be considered with reference to the ruling in *Furzund Hossein* v. *Janu Bibee*[1] is whether the expressions mentioned in the *Hedaya* as constituting express divorce are exhaustive of the forms of such divorce or are mere illustrations of the ways in which the different combinations of the root-word t, l and q may be used. On reading the passage from *Hedaya* cited above one would *prima facie* be led to think that the phrases in question were meant to be exhaustive of the forms of such divorce, but that is not so pointed out in Fathul Kadar, Vol. 3, page 350 (printed at Maimania Press, Cairo), a most authoritative commentary on *Hedaya*. The *prima facie* meaning of the passage would be that there were no Sureeh forms of divorce except those mentioned, but that is not what is meant and later on the author (*i. e.* of *Hedaya*) mentions *tatliq* the infinitive form of t, l, q as among the express terms of divorce although not mentioned before. And the language of the Kauz (a treatise of great authority on the Hanafi Law) which is to the effect "*for instance*, 'thou art *Taliqun* (divorced) and *Mutallagatun* (divorced)' and 'I have divorced thee (*tallaqtoke*)' is better * * " That this is so can admit of no doubt if once we remember that the only question in connection with a word or phrase being either sureeh or kinayah is whether the law does or does not regard it as clearly and unmistakably expressive of the meaning of the man the legal significance of whose act is in dispute. And we are not aware that the Mahomadan law in this connection pays any regard to the fact of the speech being in the direct or indirect form. Similarly by the definition of *Talak* given in Fatawa Alamgiri quoting from Bahmr Raiq and cited in *Furzund Hossein* v. *Janu Bibee*[2] from Baillie's Digest at p. 205 what is meant by the passage

1. (1878) I.L.R. 4 C. 588. 2. *Ibid* 591.

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'Repudiation or Talak' as the term is defined in law, is a release from the marriage tie either immediately or eventually by the use of especial words' is not that the law gives effect to a divorce only if some special or particular words are used, but that talak denotes dissolution of the marriage tie when it is effected by words of the husband conveying that meaning as distinguished from the setting aside by the Court of a marriage on grounds like those mentioned above—see Bahmr Raiq ; Egyptian Ed., Vol. II, p. 252.

The learned Judges also rely upon another passage in Baillie's Digest *viz.*, 'Its pillar is the expression.' "Thouart repudiaed" or the like. But with great respect it is difficult to see how that passage affords any authority for the proposition that the words of repudiation must be directly addressed to the wife, since the expression within inverted commas is cited as a mere illustration. We may mention that the ruling in *Furzund Hossein* v. *Janu Bibee* [1] has been considered in two recent cases—*Sarabhai* v. *Rahiabhai* [2] and *Ful Chand* v. *Nazab Ali Chowdhry*[3]. In *Sarabhai* v. *Rahiabhai*[2], *Batchelor* J. observes that if *Furzund Hossein* v. *Janu Bibee*[1] be understood to lay down that a pronouncement of divorce in order to be valid must be made directly to the wife he is not prepared to follow the ruling because the Mahomadan law nowhere lays down such a condition. We quite agree in that view. In *Ful Chand* v. *Nawab Ali Chowdry*[3], *Stephen* and *Doss*, JJ. also held that the absence of the wife makes no difference to the validity of a divorce otherwise duly effected, but they think that in *Furzund Hossein* v. *Janu Bibee*[1] there is no express decision to the contrary.

The result is that the defendant having been, in our opinion, validly divorced by the plaintiff, the latter's suit for restitution of conjugal rights fails. The appeal will, therefore, be allowed, and the judgment of the lower appellate Court set aside and that of the Munsif restored. The appellant will have her costs throughout. We may mention that, in the view we have taken, it becomes unnecessary to consider the other questions raised by the appellant, *viz.*, whether the plaintiff has been guilty of such cruelty as would disentitle him to restitution.

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1. (1878) I. L. R. 4 C. p. 588. 2. (1905) I. L. R. 30 B. 537.
3. (1908) I.L.R. 36 C. 184.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present : Mr. Justice Munro and Mr. Justice Abdur Rahim.

Syed Saib .. .. Petitioner*

v.

Meeram Bee .. .. Counter-Petitioner.

Syed Saib v. Meeram Bee.

Cr. P. C., S. 488—Applicability—Essentials—Relationship of husband and wife —Mahomedan Law—Marriage—Talak or Divorce—Rajai and Bayan Talaks, Iddat explained.

An irrevocable divorce does not completely destroy the relationship of husband and wife until after the expiry of the period of Iddat, and a wife in that position is entitled during Iddat to an order for maintenance under S. 488, Cr. P C.

On a petition by the wife under S. 488, Cr. P.C. a Magistrate can make or enforce an order under the section only if the relationship of husband and wife exists between the petitioner and the counter-petitioner.

It is not only competent to a Magistrate to refuse to enforce an order duly made under S. 488, Cr. P. C., on the ground that the relationship of husband and wife has ceased to exist since the date of the order, but he is also bound to abstain from enforcing his order under such circumstances [*Shah Abu Ilyas* v. *Ulfat Bibi*[1] referred to.]

Marriage, Talak (Rajai and Bayan) *i. e.*, divorce revocable and irrevocable, Iddat, and their incidents, both according to the Hanafi and Shafei lawyers, discussed and explained. [*In re Din Mahomed*[2] ; *Shah Abu Ilyas* v. *Ulfat Bibi*[1]; commented on.]

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Deputy Magistrate's Court, Cuddapah, in D. No. 21 D of 1909.

Muhammad Ibrahim Saib for petitioner

The Public Prosecutor (*C. F. Napier*) *contra.*

K. C. Desikachari for counter-petitioner.

The Court made the following

ORDER :—The only question which calls for decision upon the petition of Syed Saib is, whether the Magistrate was right in holding that the counter-petitioner, Meeram Bee, who was the wife of Syed Saib, but is alleged to have been divorced by him in the irrevocable form by pronouncement of three Talaks, is entitled during the period of her Iddat, supposing such divorce is proved, to the benefit of an order for maintenance which had been made in her favour before the pronouncement of Talak. The Magistrate relies upon the decisions in *Gulam Mohidin* v. *Kasara Bibi* [3], *In the matter of the petition of Din Mahammad* [2] and *Shah Abu Ilyas* v. *Ulfat Bibi* [1] in support of

* Cr. R. C. No. 309 of 1909. 28th October 1909.
Cr. R. P. No. 217 of 1909.

1. (1896) I. L. R. 19 A. 50.
2. (1882) I. L. R. 5 A. 226.
3. (1879) Weir's Criminal Rulings Vol. II, p. 617.

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his view, but it is argued by the vakil for the petitioner that these cases do not lay down the law correctly. His contention would be valid if it can be said that according to Mahomedan law a woman irrevocably divorced ceases even before the expiry of her Iddat to be the wife of the person who so divorced her. And here it may be stated at once that there can be no question but that Meeram Bee is entitled under the Mahomedan law to maintenance during her Iddat from the petitioner. A Magistrate, however, exercising summary powers conferred on him by S. 488, Code of Criminal Procedure, can make or enforce an order to that effect only if the relationship of husband and wife exists between the two, but in order to determine this, and only to that extent, we must ascertain the effect in Mahomedan law of an irreversible divorce on conjugal relations. But before going any further we may mention that some doubt was entertained at one time as to whether it is competent to a Magistrate to refuse to enforce an order duly made under S. 488, Crl. P. C., on the ground that the relationship of husband and wife has ceased exist since the date of the order, but a series of decisions have held, and, in our opinion, rightly held, that the Magistrate not only has the power, but is bound to abstain from enforcing his order under such circumstances—see *Shah Abu Ilyas* v. *Ulfat Bibi*[1] where the authorities are discussed.

We may say at the outset that the question under consideration is by no means easy of determination and can only be satisfactorily determined by taking into account the extent and the mode in which an irreversible Talak affects those marital rights, obligations and disabilities which go to constitute in law the relationship of husband and wife. For we shall find that the language of a definition such as that of marriage and Talak as given in any particular text book or of an argument advanced in it in support of a certain right or disability of the wife or the husband during the period of Iddat, however useful as a guide, does not by itself afford a certain basis for a conclusion. Now the rights, obligations and disabilities ordinarily incident to a valid and subsisting marriage may be thus summarised. Each of the parties has a right to the conjugal society of the other; in

1. (1896) I. L. R. 19 A. 50.

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the event of death of one of them the survivor is entitled to a share of the inheritance as an heir ; the husband is entitled to a certain degree of control over the liberty of movement of the wife; the wife is entitled to maintenance and residence and to be paid such portion of her dower as is payable by the husband on demand but not of the 'deferred' portion ; the husband can have three more wives at the same time and not more, but the wife cannot marry any other person ; neither of them can marry within certain degrees of relationship of the other on account of what is called prohibition for affinity—which prohibition is of a permanent character—for instance, one cannot marry the mother of the other ; the husband can marry three other women in addition but cannot associate together by marriage his wife and her sister or certain other relations of hers ; and if there be children born in wedlock or 'on the marital bed,' to translate an Arabic phrase, the father is bound to maintain them, and when they no longer need the maternal care he, and, in his absence, his relatives have a right to their custody until they are grown up. To dissolve the marriage tie is a right recognized in the husband and we have had occasion in the case of *Asha Bibi* v. *Kadir Ibrahim Rowther*, [1] to explain the theory on which this right is founded. Such dissolution of marriage is called Talak, which is usually translated as divorce. Talak, however, is regarded by the Hanafis as a dangerous act from a purely religious point of view, because it puts an end to marriage, an institution in which temporal and spiritual concerns not only of the husband and the wife but of the children and of the society in general are involved, as is pointed out in the case just mentioned. The law, while it permits divorce, having regard to the fact that sometimes it may not be possible for the parties to live together in peace and harmony, fulfilling all those religious and moral duties which are associated with married life, insists not only that there shall be some guarantee that the husband should not be acting from caprice or upon a momentary provocation but takes care that the interests, of the children that may be born in consequence of the marriage should not be jeopardised. The first precaution lies at the root of the distinction between a revocable and an irrevocable divorce and the enforcement of the Iddat, or the period during which a

1. (1909) 20 M.L.J. 1.

woman whose marriage has been dissolved by divorce, or death, is bound to wait before she is free to marry again, is a sufficient safe-guard ensuring correct ascertainment of the paternity of the child that may be born to the woman after such dissolution. So far as the legal effect of a divorce is concerned the rule as to the time when it is to be pronounced, namely, during the state of purity of the wife, has only a theological significance, and the two important forms of divorce, from a legal point of view, are the 'Rajai' usually translated as revocable or reversible and Bayan, *i. e.*, irrevocable or irreversible. A simple pronouncement of the sentence of Talak, once or even twice, constitutes a revocable divorce which means that the husband is entitled to undo its effect if he so chooses, but he must express his intention to that effect either by words or in act before the expiry of the period of Iddat which counts from the date of the first pronouncement. If he allows the period of Iddat to lapse without revoking the divorce, there is a complete cessation of the relation of husband and wife at the end of that period. Iddat is, as ordinarily calculated, the period of three menstrual courses, and in the case of a woman not subject to such courses it is three months ; in the case of a widow Iddat is of four months and ten days, and if a woman is pregnant, her Iddat is in any case prolonged until confinement.

What then are the legal effects of a reversible divorce? During Iddat the husband still retains his right of access to the wife, but the latter has no corresponding right until revocation to the conjugal society of the former. No doubt it would be proper on the part of the husband before seeking the society of his wife in such predicament to revoke the divorce formally, but this is not necessary in law ; he cannot, however, compel her to accompany him on a journey, but otherwise she remains under his matrimonial restraint ; she is entitled to residence and maintenance and the deferred portion of her dower becomes due. If he has three wives at one time in addition to the divorced wife, he cannot marry a fourth woman, nor can he marry such wife's sister, and if either of them dies before the efflux of Iddat the survivor is entitled to a share in inheritance from the deceased. These being the incidents of a revocable divorce it is obvious that such divorce,

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though not without some effect on marital relations during Iddat, does not absolutely put an end to the relationship of husband and wife; and in this all Sunni lawyers agree. If a divorce in this form can be said, therefore, to effectuate a dissolution of marriage, as is implied in the general definition of Talak, the dissolution so caused is only tentative and prospective. The essential difference between this form of Talak and an irrevocable Talak which may be effected by three pronouncements in one and the same speech, or, if separately, within the period of one month, or by the use of an emphatic expression conveying the intention to pronounce an irreversible divorce, is this. The effect of an irrevocable divorce cannot, as the description implies, be recalled even during Iddat. In both cases, on the expiry of Iddat all those relations which are incident to a marriage come to an end. But the immediate effect of an irrevocable divorce, unlike that of a revocable divorce, is to make it unlawful for the husband to cohabit with the wife, and if he cohabits with her with knowledge of the unlawfulness of the act, he becomes liable to the sentence of death—the punishment awarded for fornication. They may marry again, but if the irrevocable divorce was by three pronouncements of three Talaks, the law places a further difficulty in the way of such union, namely that before remarriage the woman should have been married to another man and divorced by the latter after he had consummated the intermediate marriage; and if one of them dies during Iddat the other gets no share in the inheritance. That being the result of an irreversible divorce according to all the Sunni schools, the Shafeis hold that it completely and effectually severs the marriage tie, and they therefore on that ground would not allow, during Iddat, maintenance to the woman so separated, unless she is already pregnant and permits the husband to marry her sister or a fourth wife. The Hanafi lawyers, however, recognize the existence of the right and the disabilities just mentioned during Iddat following upon an irrevocable divorce, and both the Hanafi and the Shafei lawyers recognize her right to residence and her subjection to the custody of her husband.

The question now is, to what we are to attribute the Hanafi law on this point—to the subsistence of the marriage tie in spite of such divorce or to some other ground? Here it is necessary

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to clear the ground by pointing out that the observance of Iddat has no necessary connection with the completeness or non-completeness of the severance of conjugal relations. For Iddat is to be observed on the death of the husband when there can be no pretence of the subsistence of a marriage, and it is not to be observed at all by a woman who has been divorced by her husband before he has had any sexual connection with her. Iddat, it should be borne in mind, is primarily imposed with a view to ascertain whether the woman is pregnant, so that the paternity of the child that is born to a woman whose marriage is dissolved may be fixed, though the rules regulating the period of Iddat cannot be said to be conterminous in all cases with that object. This is a matter to which the Mahomedan Law, which recognizes legitimate descent only attaches considerable importance, not only in the interests of the child which may be born susequently so that its father may be made responsible for its maintenance and up-bringing, and it may not suffer the stigma of being of "unknown descent" (Maj'-hul-un-nasib) but also in the interests of the father and his relatives so that their lineage may be preserved. No doubt, in cases in which Iddat is imposed the woman does not recover her complete marital liberty until the period has expired, but this only shows that in the Mahomedan law the marriage tie may no longer exist as on the death of the husband, and yet some of the legal incidents usually associated with a subsisting marriage may survive for some time. But it cannot be taken to prove the converse proposition that because some of such rights and obligations are suspended or lost, the relationship of husband and wife has necessarily ceased to exist.

To what then are we to ascribe, in the first place, the continued incapacity of the husband who has irrevocably divorced his wife to marry her sister during Iddat or to marry a fourth wife if he has already three wives excluding the woman who has been divorced. It seems that the law on this point can be satisfactorily explained only upon the hypothesis that the marraiage still subsists so that the diovrced woman still retains the status of wife, and that is the ground on which *Hedaya* bases the law (see Hamilton, Grady's Edition, pp. 30 and 32). Ibn Hammam, the author of *Fathul Quder*, a well known commentary of

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Hedaya, and whose opinions are undoubtedly entitled to an independent weight, however, observes in this connection (see *Fathul Quder*, Egyptian Edition, Vol. I, p. 132), that it would be more accurate to say that some of the consequences of marriage subsist during Iddat of an irrevocable divorce rather than the marriage itself. But this hardly affords any explanation of the law.

As to the rights of maintenance and residence, these are also upheld by the author of *Hedaya* substantially on the same ground, that is to say, subsistence of marriage during Iddat so far as some of its consequences including these rights are concerned. The argument is that one of the most important ends for which marriage is legalized is the begetting of children, and as Iddat of divorce is enforced for the purpose of ascertaining whether the woman is bearing a child and she is therefore obliged to live under the protection of her husband, he is not only bound to provide her with residence but also with maintenance, because maintenance is a return for the custody of the husband with reference to the chief end in view in marriage. And the Hanafi lawyers draw a distinction between this case and the case of a woman undergoing Iddat of widowhood, holding that the latter has no right of maintenance, because the marriage no longer subsists, while her Iddat and right to be provided with residence are based on special texts (see Hamilton, Grady's Edition, p. 145). In our opinion, therefore, an irrevocable divorce does not completely destroy the relationship of husband and wife, until after the expiry of the period of Iddat, and therefore a wife in that position is entitled during Iddat to an order for maintenance under S. 488 of the Code of Criminal Procedure, as held in the cases cited above. But it must be admitted that we have arrived at this conclusion after considerable hesitation. We may, however, mention that we should not have thought it necessary to deal with the question at such length but for the fact that in none of the reported cases brought to our notice is the question discussed with reference to its obvious difficulties. In *Gulam Mohidin* v. *Kesara Bibi*[1] the ground upon which *Turner* C. J. bases his decision is that under the Mahomedan Law a wife irrevocably divorced is entitled to

1. (1879) Weir's Cr. Rul., Vol. II, p. 617.

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maintenance during Iddat, but as has already been pointed out that does not conclude the question whether she is so entitled under the Code of Criminal Procedure. In *In the matter of the Petition of Din Mahammad,*[1] in which *Mahmood* J. considered the question in its proper aspect, the learned Judge mainly satisfied himself with quoting a passage from Hamilton's *Hedaya* (Grady's Edition, p. 100) which runs thus: "A marriage is accounted still to subsist during the Iddat with respect to various of its aspects, such as the obligations of alimony, residence and so forth, and hence it may lawfully be accounted to continue in force with reference to the woman's inheritance, but as soon as the Iddat is accomplished a further procrastination is impossible, because the marriage does not continue in any shape whatever." In the original *Hedaya,* however, the words "such as the obligation of alimony, residence and so forth" do not occur, and apparently the Persian version which Mr. Hamilton translated has imported these words from *Kifayah,* a well-known commentary of *Hedaya* (see *Fathul Qudir,* Egyptian Edition, where both the *Hedaya* and the *Kifayah* are printed at pp. 3 and 4, Vol. IV). *Mahmood* J., moreover, does not consider the question with particular reference to an irrevocable divorce which, as we have pointed out, differs from a reversible divorce in some important respects. Further, the passage in *Hedaya* corresponding to that quoted by the learned Judge, occurs in a discussion of the question as to the right of inheritance of a wife divorced by her husband in his death-illness, and the main ground on which her right as an heir is recognized is that according to Mahomedan Law, when a man is seized of an illness which subsequently ends in his death, his heirs acquire a sort of inchoate right in his possessions during such illness, and hence the husband during such sickness is not allowed by divorcing her to defeat the rights which have already begun to accrue to the wife. The case of *Shah Abu Ilyas* v. *Ulfat Bibi* [2] merely adopts *Mahmood* J.'s judgment on the point in *In the matter of the petition of Din Mahammad*[1].

The revision petition must be dismissed.

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1. (1882) I. L. R. 5 A. 226. 2. (1896) I. L. R. 19 A. 50.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Natesan Chetti *alias* Chidambaram Chetty and another .. Appellants* in all appeals (*Defendants*)

Vengu Nachiar, A. No. 158, Sella Nachiar, A. No. 159, Bothakka Nachiar A. No. 160, } Respondents (*Plaintiffs*).

Natesan Chetti v. Vengu Nachiar.

C.P.C. (Act XIV of 1882) Ss. 375—"Relates to the suit," meaning of—Registration Act, Ss. 3, (1), 17, Sub-Ss. 1 and 2—Registration of compromise decrees relating to leases, if necessary—T.P.A., S. 107—Transferor and Transferee—Delivery of possession—Essentials—Statute—Construction—Proviso.

The words "relates to the suit" in S. 375 of the Code (1882) means "relates to the matter of the claim in the case" and there is nothing in the section to restrict the relief granted in the compromise to what is prayed in the plaint or less. [*Ramdhari Kuar* v. *Kahan Lal Chaudhry*[1] ; *Gurudeo Singh* v. *Chadrika Singh*[2], applied. *Venkatappa Nayanin* v. *Thimma Nayanin*[3]; *Muthu Vijaya Raghunatha Udayana Tevar* v. *Thana davaraya Thambiran*[4]; *Joti Kuruvetappa* v. *Izri Sirusappa*[5]; not followed.]

The provisions of the Registration Act do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or orders made by Court. [*Bindesur Naick* v. *Gangasaran Saha*[6] referred to.]

Decrees and orders are clearly outside the scope of S. 17 of the Registration Act whether they relate to leases or not ; and Sub-S. 2 of S. 17 has not the effect of making decrees and orders relating to leases compulsorily registrable.

Provisoes are often inserted unnecessarily excepting cases which would not otherwise fall within the enactment for the purpose of removing apprehensions, and cases not otherwise clearly outside the scope of an enactment cannot be brought within it by any inference founded on the terms of the proviso.

In India attornment by the tenants liable to pay rent and receipt of rent from them are not necessary to give the transferee possession of the rent even where the transferor has possession to give ; and where the transferor has no possession to give, all that he need do is to send a notice to the lessee to pay the rent to the transferee.

The plaintiffs were sued in a prior litigation by their sister and the defendant's father. The sister claimed to be entitled to all the villages and the defendant's father claimed to be a lessee under her. The suit was compromised on the terms that the plaintiffs were to accept the lease by their sister to defendant's father and each of the sisters was to be entitled to ¼ of the rent payable thereunder. One of the terms of the compromise was that the four sisters were to send yadasts to the lessees in possession of the villages to pay their rent to defendant's father.

Held:—(1)That the compromise was one relating to the suit and as such good and enforceable.

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*A. Nos. 158, 159 and 160 of 1907. 3rd September 1909.

1. (1908) 13 C.W.N. 217.
2. (1907) I. L.R. 36 C 193
3. (1894) I. L. R. 18 M. 410.
4. (1898) I. L. R. 22 M. 214.
5. (1907) I. L. R. 30 M. 478 at 480.
6. (1897) I.L.R. 20 A. 171. (P.C.)

(2) That the compromise was not bad for want of registration, whether it related to the lands included in the suit or not, either under S. 17 of the Registration Act or under S. 107, T. P. A.

(3) That there was sufficient delivery of possession in the case by plaintiff's giving notice to the lessees in possession to pay rent to the defendant's father.

Appeals from the decrees of the Subordinate Judge's Court of Madura, East, in O. S. Nos. 1, 2 and 3 of 1906, respectively

These are three suits for rent against the same persons to which the defences are (1) that a compromise decree which was alleged by the plaintiffs to constitute the lease was invalid as a lease, not having been registered; (2) that possession was not delivered, and (3) that there was a subsequent agreement in the shape of a condition precedent to the payment of rent. The first question is as to the construction of the compromise decree. The suit in the compromise decree was by the 1st plaintiff as heir of *R*, her mother, to all the properties of *R* against her three sisters as defendants. The 2nd plaintiff who was a lessee from *R* joined the 1st plaintiff in that suit with a view to recover the whole as a lessee of the 1st plaintiff whom he recognised as the sole heir of *R*. The defendants therein admitted 1st plaintiff's right to ¼ of the whole and to the 2nd plaintiff's right to be a lessee of that ¼th. They did not admit the rest. The compromise agreement recognising this admitted right stated that thereafter the plaintiff and the three defendants were each to be owner of ¼th and that 2nd plaintiff was to be lessee of all, *i.e.*, of each in respect of ¼th. But the decree which was passed in the case was simply that there shall be a decree in the terms of the compromise in so far as it was 'consistent with the plaint'. Overruling all the contentions of the defendants decrees were now passed for the rents claimed. Other facts are given in the judgment.

P. R. Sundara Aiyar, *S. Srinivasa Aiyangar* and *C. V. Ananthakrishna Aiyar* for appellants (defendants.)

The Advocate General (*P. S. Sivaswami Aiyar*) and *K. N. Aiya* for respondents (plaintiffs).

P. R. Sundara Aiyar:—I submit that out of the compromise the only thing that could be deemed to have been embodied in the decree is only what was originally admitted and the rest of it was outside the plaint. It cannot be deemed to include the other terms of the compromise which are not only foreign to the scope of the plaint but which, if carried out, would (1) give a

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right in each of the defendants to ¼th of the suit properties, (2) destroy the old lease of the whole of the suit properties which the 2nd plaintiff had from *R*, and (3) create new leases each for ¼th in favor of the plaintiff and the 3 defendants—cf. S.373, C.P.C. The lower Court quotes *Purna Chandra Sarkar* v. *Nil Madhub Nandi*[1] in favour of its view that the leases must be deemed to have been incorporated in the decree as it was a condition on which the other portion of the decree in favour of the then plaintiffs was agreed to be granted. I submit that as in the written statement the defendants had admitted all the rights which the decree gave the then plaintiffs, there was no necessity for their accepting it on any condition, and also that as the decree does not state that the rest of the compromise is to be the condition on which the decree in favour of the plaintiffs was given, the portion in favour of the then defendants cannot be deemed to be part of the decree. Next, the statement of a lease as a condition is not itself a lease, and a lease has to be registered, whether it is in a decree or in a deed—S. 17 of the Registration Act; S. 375, C. P. C.; *Gurudeo Singh* v. *Chandrika Singh*[2]; *Patha Muthammal* v. *Esup Rowther*[3]; *Muthayya* v. *Venkatarathnam.*[4] Moreover S. 107 of the T. P. Act applies to the case.

The Advocate General.—The written statement in the previous case wanted the suit to be dismissed as regards Tiruvattiyur one of the six villages. The decree does incorporate the terms of the compromise. S.375 speaks of "so far as it relates to the suit." The Court intends to do what the law requires it to do—*Ramasami* v. *Ramasami*[5]. The words "so far as it relates to the suit" would include what was pleaded by both parties to the suit. The words "in so far as it is consistent with the plaint" means in so for as it does not go beyond the subject-matter of the plaint or the reliefs sought in the plaint. The reliefs granted by the decree need not be the identical reliefs sought for. They may be less and they may be of a different character; *e.g.*, in a suit for land which each party claims as his, a compromise decree may grant the plaintiff Rs. 100 and dismiss the plaint.

The plaintiffs wanted to recover the whole of the village (Tiruvattiyur) while the defendants admitted the plaintiff's right

1. (1901) 5 C. W. N. 485.
2. (1907) I. L. R. 36 C. 193.
3. (1906) I. L. R. 29 M. 365.
4. (1901) I.L. R. 25 M. 563
5. (1907) I. L. R. 30 M. 255.

only to ¼th of the rest. The compromise decree in respect of this village was that the plaintiffs be put in possession of the whole village on certain conditions. Such a decree will not be inconsistent with the plaint. The fact that the defendants also do get some advantage under the compromise decree will not make it inconsistent with the plaint. The conditions annexed to the decree may be either declaratory or executable. As there was a lease already executed by the 2nd plaintiff in favour of the 1st, the agreement was that that shall be in favour of the 1st plaintiff and of the 3 defendants, each to the extent of ¼th and that the 2nd plaintiff shall pay each of them ¼th of the whole rent. Even without there being a lease of ¼th in favour of each of the four, the agreement to pay each ¼th of the rent would be valid. There is no undertaking in the compromise to execute any new lease. There was on necessity to grant any new lease. 2nd plaintiff was given the possession he asked for on condition of his paying a certain amount to the defendants—*Pranal Anni* v. *Lakshmi Anni*[1]; *Joti Kuruvetappa* v. *Izri Sirusappa*[2]; *Subbarayudu* v. *Venkatarathnam*[3]; Ap. 202 of 1904 (unreported) ; S. A. 673 of 1906 (unreported); *Govinda Chandra Pal* v. *Dwarka Nath Pal*[4]; *Jasimuddin Biswas* v. *Bhuban Jelani*[5]; *Gupta Narain Das* v. *Bijoya Sundari*[6].

The last two cases also decide that registration is not necessary as regards compromise decrees—*Purna Chandra Sarkar* v. *Nil Madhub Nandi*[7]; *Ramdhari Kuar* v. *Kannan Lal Choudry*[8]. *Gurudeo Singh* v. *Chandrika Singh*[9], quoted by the other side, is opposed to the other cases decided by the Calcutta High Court and is wrong with regard to the decision on the point of registration.

In the present case there is no lease but only a decree. Anything which will have the effect of a lease does not thereby become a lease. There is no definition of lease in the Transfer of Property Act and the Registration Act simply says that a lease "includes. * * * ". As to S. 17 of the Registration Act, Cl. (*b*) and (*c*), they were inserted *ex majore cautela*. By the specific mention of certain kinds of documents in clauses (*b*) and (*c*) other documents are not to be supposed to require registration even if they are embodied in decrees. A lease is an act of

1 (1899) I L. R. 22 M. 508 (P. C.)
2. (1907) I.L.R. 30 M. 478 480.
3. (1907) 17 M. L. J. 200.
4. (1908) I. L R. 35 C. 837 841.
5. (1907) I. L. R. 34 C. 456, 462.
6. (1897) 2 C. W. N. 663.
7. (1901) 5 C.W.N. 485.
8. (1908) 9 C.L. J. 16, 13 C. W N. 217.
9. (1907) I.L.R. 36 C. 193. 222.

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the party. A decree is an act of the Court. Registration is necessary only when it is an act of the parties, *i.e.*, only when they are executed by parties, as is apparent from the opening words of the section—*Biraj Mohinee Dasee* v. *Khedar Nath Karmakar.*[1] The answer to the objection based upon S. 107 of the Transfer of Property Act is the same. The Transfer of Property Act deals only with acts of parties. If the agreement is incorporated in the decree it does not require registration. If not incorporated it is a mere agreement, and it is a lawful agreement which will be binding upon the parties—see *Bindesri Naick* v. *Ganga Saran Sahu*[2]; *Pranal Anni* v. *Lakshmi Anni*[3]; *Raghubans Mani Singh* v. *Mahabir Singh*[4]; *Muthayya* v. *Venkata Rathnam*[5]. *Patha Muthammal* v. *Esuf Rowther*[6] is wrong, in so far as it is opposed to the ruling of the Privy Council in *Pranal Anni's case*[3] is really in my favour. If the agreement is embodied in the decree it may be executable or declaratory. But the Judge has, on a previous execution petition filed to recover rent, ruled that no decree had been passed in my favour entitling me to execute. The function of an executing Court is only as regards the execution, discharge or satisfaction; it cannot decide that there is no decree or no valid decree. The existence of a decree, it must assume. In this case the Judge has held that what was granted in my favour by the compromise agreement did not form part of the decree. An erroneous decision on a question of law will not be *res judicata*—*Aitamma* v. *Naraina Bhatta*[7]. Anyhow this agreement is embodied in the compromise, and that is judicial evidence of my right and I can enforce it in a suit. It is not open to any one to blow hot and cold. Therefore S. 244, C. P. C., cannot be a bar.

P. R. Sundara Aiyar in reply.—When the defendant's daughters said that they 'accepted the lease' given by the 1st plaintiff in the previous suit, there was a new lease created in favour of each daughter. No words of demise are necessary to constitute a lease—*vide* the definition of 'lease' in the Registration Act. Even an agreement to lease is a lease. *Stroud's Judicial Dictionary* says that any instrument having the effect of a lease is a lease. The old lease is split up into four new leases in favour of new people. There can be no ratification by one for

1. (1908) I.L.R. 35 C. 1010.
2. (1897) I.L.R 20 A. 171 (P. C.).
3. (1899) I. L. R. 22 M. 508, 511, 513.
4. (1905) I.L.R. 28 A. 78, 80.
5. (1901) I. L. R. 25 M 563.
6. (1906) I.L.R. 29 M. 365, 367.
7. (1907) I.L.R. 30 M. 501, 504.

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whom an act was not originally done. If a sum of money is payable as rent it cannot be decreed unless there is a lease. As to when one lease should in law be deemed to be surrendered and a new lease created, see *Woodfall* on *Landlord and Tenant*, p. 342 *et seq*. Any alteration in the conditions will cancel the old lease and create a new one. A compromise decree stands on the same footing as the contract of compromise as regards its validity—*Krishnabhai* v. *Hari Govind* [1] ; *Nagappa* v. *Venkata Row* [2]; *Lakshmanasami* v. *Rengamma*[3] ; *Ramasami* v. *Ramasami*.[4] As regards the decree that can be passed under S. 375, it must be one that relates to the subject-matter and to the suit. Any decree which contravenes this rule will be *ultra vires* so far as regards the portion contravening—*Venkatappa Nayanim* v. *Thimma Nayanim*[5] ; *Muthu Vijaya* v. *Thandavaraya*.[6] The cases quoted by the other side are not against this view if we look to the facts and the pleadings in those cases. A decree may give a relief in favour of a party on certain conditions, but the conditions themselves cannot be availed of by the opponent as a part of the decree, for to include that would be outside the scope of the suit. As regards the necessity to register decrees, the Privy Council has not, in the two cases cited, decided that they do not require registration. All that they say is that the narration of the *agreement* would only be *judicial evidence* thereof. A compromise petition is not a pleading. It comes in when pleadings are ended. Even if the compromise had been embodied in the decree, still it will be invalid for want of registration.

P. R. Sundara Aiyar on the merits.—Unless there is a contract to the contrary the law implies, in the case of a lessee, a covenant for possession and quiet enjoyment. If the covenant is broken by the tenant not attorning to me there is a failure of consideration, and so the lessor cannot recover rent in proportion to the failure of consideration.

The Advocate-General on the merits.—The transaction between the parties is not a lease: it is partly merely a chose in action, being only a transfer of the right to collect rents, and partly a transfer of a reversion by way of lease. By giving notice to the lessee to pay the rent to the transferee, the

1. (1906) I.L.R. 31 B. 15.
2. (1900) I.L.R. 24 M. 265.
3. (1902) I.L.R. 26 M. 31.
4. (1907) I.L.R. 30 M. 255.
5. (1894) I.L.R. 18 M. 410.
6. (1898) I. L. R. 22 M. 214.

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transferor does everything he is in law bound to do in respect of the former—*vide* the definition of an 'actionable claim': S. 2 and S. 131 of T. P. Act. Rent is a debt, whether it is rent for past period or for the future—*Arunachellam Chetti* v. *Subramaniam Chetti*[1]; *vide* S. 130 of the old T. P. Act; Foa on *Landlord and Tenant*, 4th Edn. pp.164 and 165; Halsbury's Laws of England, Vol. IV, pp. 360, 363, 368, 375 on the meaning of 'chose in action.' Even future debts are choses in action—*Knill* v. *Prowse*[2];Encyclopœdia of Laws of England, 2nd Edn., Vol. 3, page 49; Shephard's Transfer of Property Act, p. 18, for the meaning of 'actionable claim'. Title to thing assigned vests as soon as the transfer is made; so the transferee must, if necessary, bring a suit to realise the claim. The covenant for quiet enjoyment can apply only in the case of an actual lease—*Mammikkutti* v. *Puzhakkal Edom.*[3] Even supposing that there is a lease of melvaram, if the original lessee, *viz.*, the Sivaganga lessees, fail subsequently to pay the rent, that cannot constitute a dispossession or breach of a convenant for quiet enjoyment. Covenant for possession or for quiet enjoyment can only be in the case of actual possession. Here the thing leased is only a right to get rent from the actual lessee If a third party collected the rent from the actual holders of the land, that would be a case of interference with the appellant's right to collect rent. Mere refusal by the ryot to attorn to the man entitled to collect rent will not constitute a failure to give possession. [*Wallis* J.—You must give such possession as the nature of the case admits of.] By refusal to attorn the actual holder of the land is not in possession of the right to collect rent. In such a case the actual holder's possession is not adverse to the landlord. If so it cannot be adverse to the assignee of the melvaram—*Zemindar of Vizianagaram* v. *B. Suryanarayana*[4]; *Raja of Venkatagiri* v. *Iskapalli Subbayya.*[5]

P. R. Sundara Aiyar on the right to collect rents, being a lease, said that this was a case of concurrent lease—Foa, p. 631; Woodfall, 240, 241, 200; *Ram Anant Sing* v. *Shankar Singh*[6] *Harman* v. *Beam*[7]; *Wordsley Brewery Co.* v. *Halford.*[8]

1. (1906) I. L. R. 30 M. 235.
2. (1864) 33 W. R. 163.
3. (1906) I. L. R. 29 M. 353.
4. (1901) I. L. R. 25 M. 587
5. (1902) I. L. R. 26 M. 410.
6. (1908) I. L. R. 30 A. 369.
7. (1853) 3 C. and K. 307,
8. (1903) 90 L. Times p. 89

K. N. Aiya on the memo of objections.—I am entitled to interest under the Interest Act on the amount of rent.

P. R. Sundara Aiyar.—The Interest Act says it is a matter of discretion. Your Lordships will consider all the circumstances of the case.

The Court delivered the following

JUDGMENT:—In these suits the plaintiffs seek to recover rent alleged to be due to them, respectively, under a compromise entered into between themselves, on the one hand, and their sister and the defendants' father, on the other, in O. S. No. 18 of 1901, on the file of the Subordinate Court of Madura, East. The plaintiffs in these suits and their sister are the daughters of the late Rajah of Sivaganga. The Rajah granted a permanent lease of six villages to his wife, and his wife in turn leased 5 of the 6 villages to the European lessees to whom the Rajah had leased the bulk of the Zemindari and who are commonly known as the Sivaganga lessees. As stated in the plaint filed by the defendants' father in O. S. No. 18, the Sivaganga lessees paid her the rent for six faslies or Rs. 60,000 in advance in 1891. The plaintiffs' mother died in 1892, and in 1900 her youngest daughter, the present plaintiffs' sister, claimed to succeed to the six villages as heiress to her mother and to the exclusion of her sisters, the present plaintiffs, on the ground that she was the sole unmarried daughter at the time of her mother's death. For the assertion of this claim she sought the assistance of the defendants' father, a leading Nattukottai Chetti in the Madura District, and in October 1900 he advanced her Rs. 30,000 on a mortgage of her interest in the villages, Exhibit A, and took a lease of them from her, Exhibit B, and in February 1901, joined with her as 2nd plaintiff in O. S. 18 of 1901, against her sisters, the present plaintiffs, for the purpose of asserting her rights and his rights as lessee under her in the suit villages. The present plaintiffs in their written statement, Exhibit N, set up that their mother took nothing under the permanent lease which they alleged was executed by the late Rajah *benami* for his own benefit, but they alleged a subsequent family settlement by which they and their sister were entitled on his death to succeed each to one-fourth share in the villages. While the suit was pending, the minor Rajah, through the Court of Wards, applied to be made a party

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for the purpose of asserting his claim to the six villages, but his application was rejected on the 5th August 1901, Exhibit O. Subsequently, on the 10th March 1902, the suit was compromised on the terms, speaking broadly, that the 1st plaintiff was to give up her exclusive claim to the six villages and that the three defendants, the present plaintiffs, were to accept the lease, Exhibit B, executed by her in favour of the 2nd plaintiff, the present defendants' father, and each be entitled to one-fourth of the rent payable thereunder. One of the terms of the compromise was that the four sisters were to send yadasts or notices to the Sivaganga lessees to pay the rent due under the lease of the 5 villages to the 2nd plaintiff, and this admittedly was done. The Sivaganga lessees, however, failed to pay any rent to the 2nd plaintiff apparently in consequence of a notice, Exhibit I, dated the 23rd June 1902, from the Court of Wards demanding the rent on behalf of the minor Zemindar and threatening a suit if it was not paid. No such suit was instituted, but the Sivaganga lessees refused to pay their rent of the 5 villages to the defendants' father and the defendants after him without an indemnity, and they in their turn refused to pay the plaintiffs their share of the rent due to them, and after an unsuccessful attempt to recover their rent in execution of the decree in O. S. No. 18, Exhibit H 1, the present suits were instituted by these plaintiffs for the purpose of recovering their respective shares of the rent.

The defendants contended that the plaintiffs were not entitled to sue because the compromise had not been registered, and also because of their failure to give possession of the rent payable by the Sivaganga lessees in respect of the 5 villages, and also that by a subsequent agreement no rent was payable to the plaintiffs until the defendants had recovered the rent payable by the Sivaganga lessees. The Subordinate Judge overruled all these contentions and gave the plaintiffs decrees. These contentions were again raised before us in appeal. Before coming to the objection for want of registration, it will be convenient to deal with certain contentions which were raised as to the scope and effect of the decree, Exhibit D. In the first place, it was said that the compromise did not relate to the suit within the meaning of S. 375, Civil Procedure Code, in so far as it constituted the 2nd plaintiff

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in the suit a lessee under the 1st plaintiff and the defendants in the suit (the present plaintiffs and their sister), and entitled the defendants in the suit to recover rent from the 2nd plaintiff, as no such reliefs were sought in the plaint, and that, therefore, this part of the compromise could not be covered by the decree. It is quite true that no such reliefs were sought and that this test was laid down as applicable to compromises in *Venkatappa Nayanim* v. *Thimma Nayanim*[1] and applied in *Muthu Vijaya Raghunatha Udayana Tevar* v. *Thandavaraya Tambiran*[2], but in a later case, *Joti Kuruvetappa* v. *Izari Sirusappa*[3], it was held that "relates to the suit" in S. 375 means "relates to the matter of the claim in the case" and that there is nothing in the section to restrict the relief granted in the compromise to what is prayed in the plaint or less. We entirely agree with this view which is also in accordance with the decisions of the Calcutta High Court in *Purna Chandra Sarkar* v. *Nil Madhub Nandi*[4], *Ramdhari Kuar* v. *Kekan Lal Choudhry*[5] and *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbehary Singh*[6]. In Original Suit No. 18 the 1st and the 2nd plaintiffs were litigating as lessor and lessee for the ownership and enjoyment of the six villages, and the compromise provided how the six villages were to be owned and enjoyed by the parties to the suit. Such a compromise, in our opinion, clearly relates to the suit, and might properly be covered by the decree.

It is next objected that this part of the compromise was not in fact embodied in the compromise decree, Exhibit D. The duty of the Subordinate Judge, under S. 375, was to pass a decree in accordance with the compromise in so far as it related to the suit, and to refuse to pass a decree in respect of such portions as did not relate to it. What the Subordinate Judge actually did was to pass an order on the petition, Exhibit D 1, "Decree in terms of the razinamah in so far as it is consistent with the plaint," and the decree, Exhibit D, sets out that the Court "resolves to make a decree in accordance with its (the razinamah's) terms and so far as is consistent with the plaint and hereby directs that the plaintiffs and defendants do abide by the same. The

1. (1894) I. L. R. 18 M. 410 at p. 414.
2. (1898) I. L. R. 22 M. 214.
3. (1907) I. L. R. 30 M. 478 at p. 480.
4. (1901) 5 C. W. N. 485.
5. (1908) 13 C. W.N. 217.
6. (1907) I. L. R. 36 C. 193 at p. 222.

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terms of the razinama are * * * " (setting them out). (The purport of the Razinama has been given above.—ED.)

Now, it is not clear what the Subordinate Judge meant by 'consistent with the plaint.' Strictly speaking, it may be contended that the whole compromise is inconsistent with the plaint as it rejects the exclusive title of the 1st plaintiff to the six villages on the basis of which the 1st and 2nd plaintiffs sued. Obviously, however, the Subordinate Judge did not take this view or he would not have passed the decree at all. Although he has expressed himself badly, we do not think the Subordinate Judge intended to do more than to comply with the provisions of S. 375 by passing a decree in accordance with the compromise in so far as it related to the suit, and that this must be taken to be the effect of his decree. On any other view, it would be necessary to consider how far the present defendants and their father, who got possession of one of the suit villages on the strength of this compromise, are now to raise an objection of this kind.

It is then said to be *res judicata* that this portion of the compromise is not included in the decree by reason of the order of the succeeding Subordinate Judge on the execution petition, Exhibit H. Now it is clear that this Subordinate Judge treated the decree, Exhibit D, as decreeing the compromise in so far as it related to the suit, and in this, we think, he was right. He also held that the decree, Exhibit D, did not award the remedy sought in the execution petition. Here again, we think he was right, for the decree, Exhibit D, can only be read as declaratory of the plaintiffs' right to rent, and not as directing payment of it by the decree as often as it fell due. The Subordinate Judge, however, went further and held that this part of the compromise did not relate to the suit and, therefore, no decree could be considered to have been passed with regard to it. We think he was wrong in holding that this part of the compromise did not relate to the suit for the reasons already given in an earlier part of the judgment, and that this was a mistake of law which, according to the decisions of this Court collected in *Mangalathammal* v. *Narayanaswami Aiyar*[1] does not give rise to *res judicata* in a subsequent proceeding in which the operation of his order is not called in question.

1. (1907) I. L. R. 30 M. 461 at p. 463.

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The contention that this part of the compromise was not embodied in the decree appears to be material only in so far as it bears on the objections for want of registration. It is said that the effect of this part of the compromise is to create a new lease from the plaintiffs and their sister in favour of the defendants' father, and that such lease is bad for want of registration under S. 17 of the Indian Registration Act. What the compromise does is to provide that the registered lease, Exhibit B, shall be accepted by the present plaintiffs and that they shall be entitled each to ¼th of the rent under it. Now we are not clear that we are bound to construe the compromise as creating a new lease so as to give an opportunity for the objection, but even if we are, we think the objection fails. In *Bindesri Naik* v. *Ganga Saran Sahu*[1] in the Privy Council, *Lord Watson*, delivering their Lordships' judgment, laid it down that the provisions of the Registration Act "do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or orders made by the Court." Applying this test it would appear to be immaterial whether this part of the compromise was embodied in the decree or not, as the compromise petition, Exhibit D1, was a pleading properly filed by the parties, and that it may be sued on without registration. In a later case, *Pranal Anni* v. *Lakshmi Anni*, [2] in which the same learned Lord again delivered their Lordships' judgment, the parties entered into a razinamah about the suit lands which was submitted to the Court and a decree passed in terms thereof. They at the same time entered into an agreement of union about certain lands excluded from the suit which was not submitted to the Court. Appended to the razinamah, however, was a note mentioning the agreement of union and a release which had been taken with regard to it. Their Lordships held that the terms of the agreement of union were related in the razinamah 'by way of remark' and that the Subordinate Judge was not asked to consider or give effect to them and that they were not like the razinamah in so far as it was submitted to and acted upon judicially by the Judge, a step of judicial procedure not requiring registration. "If," their Lordships went on to observe, "the parties had settled the suit upon the terms that they were to

1. (1897) I L R. 20 A. 171.

2. (1899) I. L. R. 22 M. 508

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take half shares not only of the suit lands but also of the lands excluded from the suit, had informed the learned Judge that those were the terms of the compromise, and had invited him by reason of such compromise to dispose of the conclusions of the suit, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated those terms of the compromise, would have been judicial evidence available to the appellant that the respondents had agreed to transfer to her the moiety of the land now in dispute." In our opinion this passage clearly means that the compromise could have been enforced, although not registered, even about the lands not included in the suit. The learned Judges who decided *Raghubans Mani Singh* v. *Mahabir Singh*,[1] understood their Lordships' judgment in the same way. In *Birbhadra Rath* v. *Kalpataru Panda*[2] and *Gurdeo Singh* v. *Chandrika Singh*[3] it was held that these decisions of their Lordships did not justify the view that petitions of compromise did not require registration in so far as they dealt with matters which were not the subject of the suit, but in the last mentioned case it is expressly laid down that "a petition of compromise in so far as it relates to properties in suit does not require registration under S. 17." The petition of compromise, Exhibit D1, undoubtedly relates to the properties in the suit and so, in either view, it does not require registration.

Mr. Sundara Iyer, however, argues that in *Bindesri Naik* v. *Ganga Saran Sahu*[4]. and *Pranal Anni* v. *Lakshmi Anni*[5] their Lordships were not dealing with leases which are governed by clause (*d*) of Sub-S. 1 of S. 17 but with instruments covered by clauses (*b*) and (*c*) as to which Sub-S. 2 creates various exemptions, amongst others "(i)—any decree or order of a Court or any award." We are not prepared to put any such restricted construction on the observations of their Lordships which mention pleadings as well as orders and decrees and appear to us to proceed rather upon the view that in the absence of clear and unambiguous words the Legislature cannot be supposed to have intended to make the proceedings of Courts dependent for their efficacy and validity on registration

1. (1905) I.L.R. 28 A. 78,
2. (1905) I. C. L.J. 388.
3. (1907) I.L.R. 36 C. 193 at p. 222.
4. (1897) I.L.R. 20 A. 171,
5. (1899) I.L.R. 22 M. 508.

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by one of the parties. Taking decrees and orders generally to be outside the scope of Sub-S. 1 of S. 3 of the Registration Act, we cannot infer that decrees and orders relating to leases are brought within it simply because certain other decrees and orders, *viz.*, those relating to clauses (*b*) and (*c*) of Sub-S. 1 of S. 17, are expressly excepted by Sub-S. 2 of that section. Sub-S. 2 is in the nature of a proviso and in *West Derby Union* v. *Metropolitan Life Assurance Co.*,[1] Lords *Watson* and *Herschell* observe that provisoes are often inserted unnecessarily excepting cases which would not otherwise fall within the enactment for the purpose of removing apprehensions, and that cases which are otherwise clearly outside the scope of an enactment cannot be brought within it by any inference founded on the terms of the proviso. Having regard to their Lordships' decisions we are of opinion that decrees and orders are clearly outside the scope of S. 17 whether they relate to leases or not.

We think that the objection for want of registration under S. 107 of the Transfer of Property Act fails similarly as that section does not apply to decrees and orders.

The next contention is that the defendants are not bound to pay because the plaintiffs and their sister have never put them in possession of the rents payable by the Sivaganga lessees in respect of the 5 villages which they are entitled to. Under the compromise the defendants, as lessees, are entitled to possession and profits on the one hand and bound to pay rent on the other, and under S. 108 (*b*) of the Transfer of Property Act a lessor is bound in the absence of a contract to the contrary at the lessee's request to put him in possession of what is leased which in this case includes the rent payable by the Sivaganga lessees. What then is the sort of possession of these rents which the plaintiffs are bound if requested to give the defendants? At Common Law for legal possession or seisin of rent, not only attornment by the tenant but also receipt of rent was necessary—Pollock and Wright on *Possession*, pp. 36,52. We have not been referred to, nor have we succeeded in finding, any English case where the point is expressly decided. In *Heelis* v. *Blain*[2] it was held

1. (1897) A. C. 647.

2 (1864) 18 C.B.N. S. 590.

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that a conveyance operating under the Statute of Uses would of itself without more give "actual possession" of rent within the meaning of S. 26 of 2 Will. IV, C. 45, but that a conveyance at Common Law would not of itself give such possession. What is required in this country in addition to the conveyance has been considered by this Court with reference to leases or izaras of villages or other parts of permanently settled Estates which are of common occurrence and it was held in *The Zemindar of Vizianagaram* v. *Behara Suryanarayana Pantulu* [1] that "according to the common law of the land which especially prevails in Zemindaris and similar Estates the delivery of possession, when the owner transfers the estate or a portion thereof by sale, gift, lease or otherwise, is by the issue of orders or notices to the karnams or other village officers and also though not usually by a general proclamtion addressed to the ryots or others in occupation giving notice of the transfer and requiring them to attorn and pay rents to the transferee", which as will be seen is very like what the defendants' father stipulated for in this case. The effect of this is that in this country attornment by the tenants liable to pay the rent and receipt of rent from them are not necessary to give the transferee possession of the rent. This must, however, we think, be limited to cases where the transferor himself has possession to give, for a transfer by a claimant out of possession, even if followed by the usual notice, could not be said to amount to a delivery of possession. Here it is to be gathered from Exhibits A, B and C, to which the defendants' father was a party, that the Sivaganga lessees took a lease of the 5 villages from the present plaintiffs' mother and paid her rent in advance to the extent of Rs 60,000. If so, the mother was in possession of the rent and her possession would enure to the benefit of her heirs, the plaintiffs and their sister. Apart from the special contract, therefore, it would appear that all that the plaintiffs and their sister could be called upon to do to give possession of the rent in question to the defendants' father was to send notices to the Sivaganga lessees to pay it to him and this they have admittedly done.

The Subordinate Judge has gone further and found that by the terms of the compromise, Exhibit D1, read with Exhibit B, all that the plaintiffs' sister, under Exhibit B, and all that

1. (1901) I.L.R. 25 M. 587 at p. 592.

she and the plaintiffs, under Exhibit D 1, were required to do was to send notices to the Sivaganga lessees, and in this we fully agree with him. Exhibits A and B show that the plaintiffs' sister, a young gosha lady, was not in a position to bring suits herself financially or otherwise, and that the defendants' father was to have sole conduct of the suit to be instituted against her sisters. During the suit he was to have the rent due from the Sivaganga lessees paid into Court, afterwards he was to get it collected, and at the expiration of their lease he was to recover the villages from them amicably or through Court. The defendants' father must have known all about these 6 villages before he advanced Rs. 30,000 to the plaintiffs' sister in October 1900, and he certainly had full notice of what could be urged in favour of the Zemindar in the written statement of the present plaintiffs in O. S. No. 18 of 1901, Exhibit N, and in connection with the unsuccessful attempt to make the minor Zemindar a party to that suit in August 1901, Exhibit O. Yet in the terms of the compromise, Exhibit D 1, he stipulates that the plaintiffs (here) shall refrain from interfering with the said villages during his lease, that he is to collect the rent from the Sivaganga lessees according to the terms of the lease, Exhibit B, and that the plaintiffs and their sister are to send yadasts or notices to pay to the lessees. This, it appears to us, was all they were required to do to give possession, and they have done it. With regard to the further contention that the plaintiffs agreed to forego their rent until the defendants succeeded in recovering it from the lessees, we agree with the lower Court that no such agreement is proved and dismiss the appeals with costs. The Memoranda of Objections are dismissed but without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph, S. Benson, Offg. Chief Justice and Mr. Justice Miller.

R. G. Orr and another .. Appellants* (*Plaintiffs*)

v.

R. M. M. S. T. Y. O. Chidambaram Chettiar (since deceased) and others .. .. Respondents (*Defendants.*)

Orr v. Chidambaram Chettiar.

C. P. C., Ss. 2, 474—Decree—Order under S. 474 dismissing an interpleader suit —Interpleader suit by tenant—"Making claim through the lessor."

An order dismissing an interpleader suit under S. 474 of the Code of 1882 is a decree within the meaning of S. 2 of the Code, and is therefore appealable.

A tenant filed an interpleader suit against two sets of claimants to the rent. One set of defendants claimed title as heirs of the deceased lessor. The other claimed title to the rent on the ground of the deceased lessor having acted for him, as *benamidar*. *Held* that the suit was maintainable and that S. 474, C. P. C. (1882) was no bar, both persons "making claim to the rent" through the original lessor, so far as the plaintiffs (the tenants) were concerned. [*Dungey* v. *Angove*[1] applied.]

Appeal from the decree of the Subordinate Judge of Madura, East, in O. S. No. 55 of 1906.

The Advocate-General (*P. S. Sivaswami Aiyar*) for appellant.

P. R. Sundara Aiyar and *K. N. Aiya Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—This is an interpleader suit which has been dismissed by the Subordinate Judge as not sustainable in law. The plaintiffs appeal against this dismissal, and we think the appeal is well founded.

For the purposes of this appeal it is sufficient to state the following facts. The late Zemindar of Shivaganga granted a perpetual lease of certain villages to his wife, Raku Nachiar, in 1887. Subsequently in the same year, he leased to the plaintiffs, for a long term of years, the whole Zemindari excluding the villages already leased to his wife and other relations. In 1889 Raku Nachiar gave a sub-lease of five of her villages to the plaintiffs for 29 years on a rent of Rs. 10,000 a year, and put the

* A. No. 33 of 1907. 7th October 1909.

1 (1794) 30 E.R 644, at 648.

plaintiffs in possession receiving the rent in advance up to June 1900 Orr v. Chidambaram Chettiar.

Raku Nachiar died in 1892, leaving her surviving four daughters who are defendants Nos. 3 to 6 and an adopted son. In 1898 the Zamindar died, and his adopted son (7th defendant) became the minor Zamindar. In O. S. No. 18 of 1901 the 6th defendant and one Ramanathan Chetti the late father of the defendants Nos. 1 and 2, to whom the 6th defendants had leased the above five villages sued to recover them from the defendants Nos. 3 to 5 and the 7th defendant put in a petition stating that the villages belonged to him and claiming to be made a party, but his petition to be made a party was dismissed. In March 1902 the parties to O. S. No. 18 of 1901 entered into a compromise, and in pursuance of it gave notice to the plaintiffs that the plaintiffs should pay the rent of the five villages in future to Ramanathan Chetti, the father of defendants Nos. 1 and 2.

On the 22nd of June in the same year the Court of Wards, as guardian of the minor Zemindar (the 7th defendant) also gave notice to the plaintiffs stating that the leases executed in 1887 by the late Zamindar in favor of Raku Nachiar were colorable transactions executed by him *benami* in the name of his wife, but for his (the late Zamindar's) benefit and that the lease of the five villages granted by her to the plaintiffs in 1889 was for the benefit of the late Zamindar and requiring the plaintiffs to pay the rents of the villages to the Court of Wards on account of the minor Zamindar. In these circumstances the plaintiffs, not knowing whether they should pay the rent to the defendants Nos. 1 to 6 or to the 7th defendant filed this interpleader suit and deposited in Court the rent due Rs. (56,060).

The Subordinate Judge having held that the suit was unsustainable with reference to the provisions of S. 474, Civil Procedure Code (Act XIV of 1882) the plaintiffs appeal.

The Vakil for the defendants Nos. 1 to 6 takes the preliminary objection that the order of the Subordinate Judge dismissing the suit is not one of the orders in the interpleader suits against which an appeal is provided for in Cl. 23, S. 588, of the Code of Civil Procedure, nor is it a decree within the definition of S. 2 of the Code. We think the latter contention is not sustainable.

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The order of the Subordinate Judge was the formal expression of his adjudication on the defence set up in the suit and it decided the suit so far as the Subordinate Judge was concerned. It is therefore a decree within the meaning of S. 2 of the Code. We disallow the objection.

The main reason given by the Subordinate Judge for holding that an interpleader suit will not lie on the facts stated in this case, is that S. 474, Civil Procedure Code, expressly prohibits a tenant from suing his landlord for the purpose of compelling the landlord to interplead with any person other than a person making claim "through the landlord," and he considered that in the present case the 7th defendant could not be said to claim through Raku Nachiar (the landlord under whom the plaintiffs held) but must be regarded as claiming adversely to her. He also dwelt on various circumstances which, in his view, went to show that the 7th defendant's plea of *benami* was not true and on the argument that the lease of the plaint villages having been given with the late Zamindar's consent, the 7th defendant would be estopped from again demanding from the plaintiffs any rent paid by them to Raku Nachiar's representatives, defendants No. 1 to 6. Whatever might be the case with regard to payments made *bona fide* before the plaintiffs had notice of the 7th defendant's claim, it is difficult to see how the plaintiffs would be protected if they wrongly paid away the rents after notice of his claim; and in the case of *Stuart* v. *Welch*[1] the Lord Chancellor, referring to the case of *Nickolson* v. *Knowles*[2], stated that the authorities at law shew that Sir J. Leach was not warranted in refusing the injunction upon the ground that the case of the party giving the notice was so clearly unfounded as not to entitle the plaintiff to have it tried. In the present case the Court of Wards has made a formal claim to the rent of the plaint villages on behalf of the 7th defendant and we must proceed to deal with the question of interpleader without reference to any alleged weakness in his case. We must, in fact, decide the question on the supposition that the case put forward by him is, or may be true. If that case is true, then Raku Nachiar was in the position of a trustee for the real owner, who was the Zemindar, and the defendants Nos. 1 to 6, who claim

1. (1839) 41 E. R. 119 at 125. 2. (1820) 56 E. R. 812.

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as her heirs, are trustees for the 7th defendant, who is now the Zemindar. No doubt the general rule of English Law is that an interpleader suit will only be maintainable if the landlord, subsequent to the letting, has done some act whereby his right to recover the rent is entangled—*Cook* v. *The Earl of Rosslyn*[1]—but there are exceptions to this rule. In the case of *Dungey* v. *Angove*[2] the Solicitor-General referred to the case of *Wood* v. *Kaye* tried before Lord *Thurlow* and said: "A house was devised to trustees for the separate use of Mrs. Kaye with a provision for the rent to be paid to the person to whom she should give a letter of attorney. The trustees not acting, Mr. and Mrs. Kaye entered. In 1783 they executed a lease to Wood for 7 years, if she should so long live. In 1787 the trustees, at the instigation of her son, insisted that as the estate was devised to them, they had a right to receive the rent and apply it to answer repairs on other parts of the estate, and they gave notice to the tenant not to pay. In consequence of his refusal the lessor proceeded upon the lease; and the tenant filed a bill." It was insisted, as it is now, that a person who had taken a lease from another, could not file such a bill. The Lord Chanceller said, it would be the most detrimental thing to the public and to tenants; because nothing can be more material than that tenants shall be safe in the occupation of the estate; that if a landlord has a complete title he may indemnify them; but that if he does not take care of the defence the consequence is the tenant has a right "to come into equity," and the Lord Chancellor, after expressing his concurrence with the decision in *Wood* v. *Kaye* said: "The title of the trustees was derivative from that of the *cestui qui trust* and was consistent with it. The tenant did not come to disavow the title of the landlord. It was a question between the trustees and the *cestui qui trust* with which the tenant had nothing to do"—30 English Reports 644 at p. 646. The principle of that case seems to us to be applicable to the present case. According to the allegations of the 7th defendant the title of Raku Nachiar (and of defendants Nos. 1 to 6) was derivative from the Zemindar and was consistent with it. The plaintiffs do not deny the title of Raku Nachiar to grant them the lease, but they do not know whether she did so in her own right or *benami*

1. (1859) 65 E. R. 871, at p. 873.
2. (1794) 30. E. R. 644 at p. 645.

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for the Zemindar. The plaintiffs have no interest in the matter except to be protected from being made to pay the rent twice over. The 7th defendant does not deny the title of Raku Nachiar to grant the lease. He affirms it, but says that it was granted on his father's behalf, and he has now succeeded to his father's rights. Then it was argued that S. 474, C. P. C., which contains the rule applicable to the Courts in India, is narrower than the rules deducible from the English cases and forbids a tenant to sue to compel his landlord to interplead with any person other than a person making claim though such landlord. We must therefore see whether the 7th defendant makes claim through Raku Nachiar and it is not difficult to hold that he does so. What he says is that Raku Nachiar was entitled by arrangement with her husband to hold the position of the landlord and what he claims is the right to stand in her shoes. In other words he makes claim through her when he claims to occupy as between himself and the plaintiffs, the same position which she occupied. So far as the plaintiffs are concerned, the 7th defendant does not claim any right different from that of Raku Nachiar. He no doubt claims the right, when he received the rent to appropriate to himself as being the owner of the land, and denies that Raku Nachiar held that position, but that claim makes no difference so far as the plaintiffs are concerned. As against them the claim of the 7th defendant is simply to occupy the position of Raku Nachiar. He claims to be the landlord by reason of the lease executed by her, and so he claims through her. For these reasons we think it is open to the plaintiffs to maintain this interpleader suit. We accordingly set aside the decree of the Subordinate Judge, and remand the suit for disposal according to law. Appellants will have their costs both in this and in the lower Court. Costs of the other parties will be provided for in the fresh decree of the lower Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and and Mr. Justice Krishnaswami Aiyar.

Gangineni Kondiah .. Appellant* (*Plaintiff*)

v.

Gottipati Pedda Kondappa Naidu .. Respondent (*Defendant*).

Kondiah v. Kondappa Naidu.

Limitation Act, Arts. 145, 49—Suit by depositor for return of deposit—Demand and refusal.

In a case of deposit of moveable property, whether there has been a demand and refusal or not, a suit for its recovery falls within Art. 145, and Art. 49 is not applicable.

Obiter :—A deposit is a gratuitous bailment, and the bailee or depositee is bound to return a mere deposit for safe custody at any time irrespective of the time specified in the contract. [*Obiter* in *Ramakrishna Reddy* v. *Panaya Goundan*[1] not followed.]

Second Appeal from the decree of the District Court of Nellore in A. S. No. 144 of 1906 presented against the decree of the Court of the District Munsif of Kavali in O. S. No. 190 of 1905.

The facts appear sufficiently in the judgment.

K. Ramachandra Aiyar for appellant.

T. V. Seshagiri Aiyar for respondent.

K. Ramachandra Aiyar:—It is submitted that Art. 145 of the Limitation Act applies to the case. Art. 145 is a special article dealing with 'deposits'. It occurs in Part IX of the Schedule. Article 49 is a residuary article. It is a well established rule of construction that specific articles should be exhausted before a general article can be applied, although the language of the general article may cover the case in question. There is no reason for holding that the language of Art. 145 cannot apply to a suit by a depositor against a depositee who may have refused to deliver on demand by depositor. Though the possession after refusal may be wrongful, still the suit is a suit against a depositee to recover a deposit and is covered by Article 145. Article 49 will apply to other cases of possession originally lawful becoming wrongful subsequently. Article 133 shows that the period for a suit

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* S. A. No. 1055 of 1907. 25th November 1909.

1. (1899) 9 M.L.J. 51.

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against a purchaser from a depositee or pawnee is 12 years, where as if Article 49 should apply to deposits after refusal by depositary, the period will be less, *viz.*, 3 years, which will be an anomaly. Article 139 refers to suits against a tenant by a landlord though the tenancy may have terminated previous to suit, that is to say, the Act will apply an Article like Article 139 though the relationship may have terminated at the time of suit.

The term 'deposit' has been defined as a gratuitous bailment for the use of the bailor. See Beale on *Bailments*, pages 50 and 51.

Article 145 covers cases of pawnee also ; it cannot be contended that if a pawnee should refuse to give possession after tender of full amount, suit will be barred after 3 years under Article 49. The English cases which hold that on demand and refusal the possession of the depositee is wrongful do not affect the present question, which is whether, even then, Article 145 of the Indian Act does not apply to a suit to recover the deposit. There is no provision in the English Limitation Act corresponding to Article 145. As to the applicability of Article 145 to a case of deposit where the depositor agrees to leave it for more than 30 years with the depositee, it is to be noted that in a deposit, which is a gratuitous bailment, the depositor can always sue to recover, notwithstanding his promise to the depositee. S. 159 of the Indian Contract Act applies the principle in the case of a gratuitous loan for use; *a fortiori* in the case of a gratuitous deposit. As for authority: *Narbadabai* v. *Bhavani Shankar*[1] is exactly in point; see also *Administrator General of Bengal* v. *Kristo Kamini Dassee*[2]; *Gopal Chunder Bose* v. *Surendra Nath Dutt*[3]. The case in *Subbakka* v. *Maruppakkala*[4] is no authority in the present case. That was a suit for recovery of title deeds in the possession of the original mortgagee after his mortgage amount was paid up by a puisne-mortgagee. That would not be a case of deposit and Article 49 may well apply. Further, it is to be noted that under Act IX of 1871 the case of title deeds was specially dealt with under Article 33, the period being 2 years, while in Article 147 corresponding to Article 145 of the later Act, the language of the Article was not altered, the special Article

1. (1902) I L.R. 26 B. 430.
2. (1904) I.L.R. 31 C. 519.
3. (1908) 12 C.W.N. 1010.
4. (1891) I.L.R. 15 M. 157.

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33 of Act IX of 1871 was repealed, and Article 49 was enacted in general terms. *Ramakrishna Reddy* v. *Panaya Gounden*[1] is no doubt in point. But the point was not decided. It is only an obiter dictum though a considered dictum. There was no demand and refusal proved in that case and hence no decision was necessary as to the scope of Article 145 or 49. But it is submitted that the reasoning in that case is not correct. There are two classes of cases arising out of a refusal by a depositee. One is an action for conversion. To such a suit Article 145 may not apply. The other suit is a suit to recover the goods deposited *in specie* or their value which latter relief need not be asked for but will be decreed under S. 208, C. P. C. This latter suit is governed by Art. 145. *Ramakrishna Reddy* v. *Panaya Gounden*[1], mixes up the two classes of suits, though in one portion it seems to deal with them severally. Further the decision in *Ramakrishna Reddy* v. *Panaya Gounden*[1] is vitiated by its reference to and reliance on *Subbakka* v. *Maruppakkala* [2] which does not touch the present question and does not refer to the Article 145 at all as relevant for the case. Reference was made to *Runchordas Vandravandas* v. *Parvatibai*[3] and *Sharoop Dass Mondol* v. *Jogendra Ray Chowdhry* [4] as to inapplicability of a general article of the Limitation Act while a special article applies. The English decisions in *Wilkinson* v. *Verity*[5], *Spackman* v. *Foster*[6], *Miller* v. *Dell*[7], *In re Tidd*[8] and Darby and Bosanquet, pp. 43, 44, 48, have no bearing on the present question as to the applicability of the specific terms of Article 145 to a suit to recover a deposit after refusal by the depositee.

T. V. Seshagiri Aiyar.—Article 145 has no application to this case. The defendant was, no doubt, a depositary to start with. But he ceased to be so the moment a demand was made of him to return the jewel deposited and he refused to comply with the demand. From that moment the detention of the jewels by defendant became wrongful and the plaintiff's cause of action arose immediately—Darby and Bosanquet, pp. 41, 43 and

1. (1899) 9 M. L. J. 51.
2. (1891) I. L. R. 15 M. 157.
3. (1899) 23 B. 725 (P. C.)
4. (1899) I. L. R. 26 C. 564.
5. (1871) L. R 6 C.P. 206.
6. (1883) 11 Q. B. D. 99.
7. (1891) 1. Q.B. 468.
8. (1893) 3 Ch. 154.

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48; Story on *Bailments*, Article 107. He ought to have then instituted the suit within the 3 years provided for by Article 49. Article 145 can apply only to cases where the defendant continues to be a depositary at the date of suit. The principle of the wrongful detention giving a cause of action to the plaintiff in supersession of the original cause of action has been recognised in the English Courts—see *Wilkinson* v. *Verity*[1], *Spackman* v. *Foster*[2], *In re Tidd*: *Tidd* v. *Overell*[3]. The decision in *Ramakrishna Reddy* v. *Panaya Goundan*[4] is directly in point. The rule of the English Law has also been adopted by the Calcutta High Court in *Gopal Chunder Bose* v. *Surendra Nath Dutt*[5]. In *Administrator General of Bengal* v. *Kristo Kamini Dassee*[6] this point of view does not seem to have been considered by the Court. There is no reference in the judgment either to a demand and refusal or to the provisions of Article 49 of the Limitation Act. In *Lala Gobind Prasad* v. *Chairman Patna Municipality*[7], at the bottom of page 637, *Mookerji* J. says expressly that in the circumstances of this case Article 49 would be the Article applicable. The decision of the lower appellate Court is therefore right.

The Court delivered the following

JUDGMENT.—The question is whether Article 145 or Article 49 applies to the suit. It is assumed for the purpose of this judgment that there was a deposit by the plaintiff's father with the defendant of a certain jewel. It is found that there was a demand and refusal more than three years before suit. If Article 49 applies, the suit is clearly barred. If on the other hand the Article applicable is 145, the suit is in time. The decisions in *Administrator General of Bengal* v. *Kristo Kamini Dassee*[6] and *Narbadabai* v. *Bhavani Shankar*[8] are clear authorities in favour of the applicability of Article 145. It is argued for the respondent that Article 145 has no application to a case where there has been a demand for the return of the deposit and a

1. (1871) L.R. 6 C. P. 206.
2. (1883) 11 Q. B. D. 99
3. (1893) 3 Ch. 154.
4. (1899) 9 M. L. J. 51.
5. (1908) 12 C. W. N. 1010.
6. (1904) I.L.R. 31 C. 519.
7. (1907) 6 C.L.J. 535.
8. (1902) I. L. R. 26 B. 430

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refusal by the depositary. In such a case it is said the possession of the defendant which was lawful from the commencement of the deposit becomes wrongful on refusal to return, and therefore the suit becomes one "for other specific movable property or for compensation for wrongfully detaining the same" and the period of three years provided by Article 49 begins to run from the date when the detainer's possession becomes unlawful. We are unable to agree with this contention. Article 145 is the special Article dealing with a suit against a depositary to recover movable property deposited and the period of 30 years provided by it runs from the date of the deposit. Article 49, on the other hand, deals generally with a suit for other specific movable property, and it seems to us to have no application where the specific provision contained in Article 145 applies. The former Article was for the first time introduced into the Limitation Act of 1877. Article 48 of this Act replaced the provisions of Articles 47 and 48 of the Limitation Act of 1871, with a slight modification. Assuming that Article 49 of the Act of 1877 might cover certain of the cases which fell within the scope of Article 48 of the Act of 1871, there is no doubt that it comprises within it several cases for which there was no provision in the specific Articles dealing with movable property in the Act of 1871. But the introduction of this practically new Article into the category of Articles dealing with the withholding of movable properties, whether such withholding was a tort or a breach of contract, cannot be deemed to provide for the cases where the possession of moveable property is transferred to another by reason of a confidential relation such as is involved in a deposit. But apart from the foregoing reasoning it is *prima facie* clear that all actions for the recovery of a deposit of moveable property are, by the express words of Article 145, comprised within it. No exception is made as regards deposits where demand and refusal make the continuance of possession unlawful. The Article includes suits against a pawnee for recovery of movable property. It cannot be contended for a moment that if a pawnee refuses to return the pledge on demand, and thereby makes his possession wrongful, there is any other Article applicable to the case. There is no reason, therefore, for making any distinction in the case of the suit for the return of the deposit. It is

further necessary to bear in mind the provisions of Article 133 of the Limitation Act. It runs as follows:—"To recover moveable property conveyed or bequeathed in trust, deposited or pawned and afterwards bought from the trustee, depositary or pawnee for a valuable consideration * * * * 12 years from the date of the purchase." This is obviously an abridgment in favour of the purchaser for valuable consideration of the period provided in Article 145 in cases of deposit and pledge and an enactment of a special period of twelve years in the case of a purchaser from a trustee when under S. 10 there would be no limitation at all in a suit against the trustee himself. See *Muthusami Aiyar* J. in *Muthu* v. *Kambalinga*[1] and Mitra on *Limitation*, page 1009. It is impossible to agrue that against the purchaser from a depositary or pledgee there is always a period of12 years from the date of the purchase no matter whether there has been a demand and a refusal but that against the depositary or pawnee himself who stands in a quasi-fiduciary relation the period of limitation is curtailed to 3 years under Article 49, the detention becoming unlawful after demand and refusal. Articles 133 and 145 have come down from the Limitation Act of 1859 in which the corresponding provisions were S. 5 and S. 1,Cl. 15. It would have been impossible to suggest when the Limitation Acts of 1859 and 1871 were in force that the shorter period of six years under the residuary Clause 16, S. 1, of the Act of 1859 or Article 118 of the Act of 1871 was applicable to a suit against a depositary after demand and refusal. No change of legal theory is discernible in the mind of the Legislature as regards such a suit in the Act of 1877. The conclusion, therefore, appears to be inevitable that in a case of deposit of movable property, whether there has been a demand and refusal or not, a suit for its recovery must fall within Article 145. It was suggested, however, in the course of argument that such a view might involve the hardship of preventing the recovery of the deposit altogether where under the terms of the agreement of deposit the article was to remain with the depositary for 30 years or more. If the depositor cannot claim back the deposit before the expiry of the period, it must be admitted that the difficulty pointed out is real. But is he precluded from claiming back the deposit before the time stipulated?

1. (1889) I.L.R. 12 M. 316 at 318.

The answer to this question depends upon an exact understanding of the nature of the deposit. A deposit is a gratuitous bailment. See Halsbury's *Laws of England*, Vol. I, S. 1074. In Sohm's *Institutes of Roman Law*, page 292, it is said: "Depositum arises when *A* delivers a movable thing to *B* for the purpose of gratuitous safe custody," and again at page 293: "The depositary is not interested in the contract. He derives no benefit from the transaction. * * * * The depositor, on the other hand, is interested in the transaction; it is for his benefit that the contract exists." In Sandar's *Justinian* we have the following:—"Here (in deposit) the benefit is entirely on the side of the person who commits the thing to the care of one who receives it gratuitously. * * * * He, has however, no right to make use of the thing." It is further pointed out that "as it is deposited for the benefit of the person depositing it, that person can reclaim it *when he pleases* and need not like the *commodans* wait for the expiration of the time agreed on." Domat in his *Civil Law* in Ss. 691, 692 and 697 defines a deposit and states it as the obligation of the depositary even when a term has been agreed upon to return it when demanded. He says: "A deposit is a covenant by which one person gives to another something to keep which he is to restore whenever the depositor shall think fit to call for it. The deposit ought to be gratuitous, for otherwise it would be a hiring and the letting to hire where the depositary would let out his care. * * * * * Since it is the nature of the deposit that the things are not deposited for the behoof of the depositary, as things lent are for the use of the borrower, but for the bare advantage of the depositor, he may take back the thing deposited *whenever he pleases even although the time of restitution were regulated by the contract.*" See also Halsbury's *Laws of England*, Vol. I, S. 1084. If this was the view adopted by the Indian Legislature as regards the relation between the depositor and the depositary, there would be no place for the suggestion of the hardship already referred to in the case of a deposit for a term, for even in such a case it would be competent to the depositor to claim back the deposit the very next day after the deposit. The Indian Contract Act passed by the Indian Legislature shortly after the Limitation Act of 1871 gives no definition of 'deposit' though it is one of the

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species of bailments dealt with in Chapter IX of the Act. Section 162 refers to the termination of a gratuitous bailment by the death of the bailor or bailee. S. 158 refers to bailment for safe custody where the bailee is to receive no remuneration. But neither of these sections has anything to say as to the time at which the bailee is bound to return the thing bailed. S. 159, however, goes on to provide that the lender of a thing *for use* may at any time require its return if the loan was gratuitous, even though he lent it for a specified time or purpose. It is an *a fortiori* case that the bailee is bound to return a mere deposit for safe custody at any time irrespective of the time specified in the contract. If this view be correct, there can be no doubt that the suggested hardship, in the application of Article 145 to cases of deposit for a term exceeding thirty years, cannot possibly arise. In Pollock and Mulla's Notes to S. 159, a query is put whether an express *contract not to recall* a thing gratuitously lent before the expiration of a certain term, would not be good in British India notwithstanding the section. It is true that there would be no difficulty about the consideration in such a case, for the mere acceptance of the deposit would be a sufficient consideration for the promise not to recall it before the expiration of the term. The question whether, in the case of a bailment upon a promise not to recall the thing gratuitously lent for 30 years or more, the application of Article 145 may not create a hardship, need not make us pause in the application of the Article to all cases of suits for the return of movable property deposited. The above conclusion is, no doubt, opposed to the *obiter dictum* of *Collins* C.J. and *Benson* J. in *Ramakrishna Reddy* v. *Panaya Goundan.*[1] But we are unable, for reasons already set forth, to agree with it. *Subbakka* v. *Maruppakkala*[2] has no bearing on the question now under consideration.

Reference was made in the course of the argument to the English Law. There is no provision in the English Law corresponding to Article 145. The Statute 21 Jas. I, Ch. 15, provides a period of six years next after the cause of the action in all actions of detinue. Under this provision a depositary whose detention of the goods becomes wrongful on refusal to deliver

1 (1899) 9 M. L. J. 51. 2. (1891) 15 M. 157.

after demand, can plead the statute successfully if six years have elapsed from the time when the cause of action arises. In *Wilkinson* v. *Verity*[1] approved of by the Court of Appeal in *Miller* v. *Dell*[2] it was held that where goods were bailed by the plaintiffs to the defendant for safe custody and the defendant wrongfully sold them, the time ran from the date of the demand for the return of the goods which the defendant refused. This view is in accordance with the opinion of the celebrated Jurist, Pothier. See Pothier on *Contracts*, by Evans, Vol. II, page 126. He says: "Where a man deposits money in the hands of another to be kept for his use the possession of the custodee ought to be deemed to be the possession of the owner until an application and refusal or other denial of the right; for until then there is nothing adverse and I conceive that upon principle no action should be allowed in these cases without a previous demand; consequently that no limitation should be computed further back than such demand." This was accepted by *North* J. in *In re Tidde* [3] as a correct statement of the English Law on the subject. However correct this may be as a statement of the principle on which a rule of limitation should rest as regards an action against a depositary for the return of the deposit, there can be no question that it is not the foundation on which the Article 145 of the Limitation Act rests. We have to apply the law in India as we find it. We must, therefore, hold that the District Judge is wrong in dismissing the suit as barred by Limitation.

The decision of the lower appellate Court is reversed and the suit remanded for disposal according to law. The costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Abdur Rahim.

Muthusawmi Mudalliar and another	..	Appellants* (*Plaintiffs*)
v.		
Masilamani *alias* Subramania Mudaliar and others	..	Respondents (*Defendants*).

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* S. A. 820 of 1906. 1st December 1909.

1. (1871) L. R. 6. C. P. 206.
2. (1891) 1. Q. B. 468.
3. (1893) 3 Ch. 154 at p. 156.

Muthusawmi Mudaliar v. Masilamani Mudaliar.

Hindu Law—Marriage—Sudras—Kaikkolar caste in Tinnevelly—Reversion of bride from Christianity to Hinduism and marriage—Validity—Suit by reversioner for declaration—No abatement on reversioner's death.

A woman born of Christian parents and belonging to the Kaikkolar (weaver) class in the District of Tinnevelly was treated at the time of marriage as a Hindu and married according to the Hindu form of marriage to a Hindu Kaikkolar. The husband and wife lived together for 30 or 40 years and were treated by the castemen as members of the caste. *Held* on the question of the validity of the marriage :—(1) That the marriage was in conformity with the custom obtaining in the caste and was therefore valid. (2) That it was vaild by reason of its being in conformity with the Hindu Law which does not prohibit marriages between any persons who are not Dvijas, *i.e.*, of the twice born classes. (3) That it was also valid because of the recognition of its validity by the members of the caste.

The term "Sudra" includes all, but those of the twice born classes, among Sudras.

If by caste usage any form other than those sanctioned by Hindu Law is considered as constituting a marriage, then the adoption of that form under the conditions prescribed by the caste with the intention of thereby completing the marriage union is sufficient to impart validity to the marriage.

Castes and their formation discussed.

Were a caste accept a marriage as valid and treat the parties as members of the caste, it would be an unjustifiable interference for the Courts to declare those marriages null and void. But if the marriage is valid under the ordinary Hindu Law its validity is not affected by its being opposed to the rules of the caste or community of the parties.

A reversioner brought a suit for possession of properties and in the alternative for a declaration that certain alienations by the widow will not bind the reversion. The lower Courts declared the alienations invalid and gave a decree for possession. The plaintiff-reversioner died pending appeal by defendant. *Held* that the suit for the declaration did-not abate, the suit being on behalf of all the reversioners.

Second appeal from the decree of the Subordinate Judge's Court of Tinnevelly in A. S. No. 364 of 1905 presented against the decree of the Court of the District Munsif of Tinnevelly in O.S. No. 290 of 1904.

The facts appear sufficiently from the Judgment.

T. R. Ramachandra Aiyar for 2nd defendant-appellant.

S. Srinivasa Aiyar for plaintiff-1st respondent.

N. Rajagopalachariar for 1st defendant-2nd respondent.

T. R. Ramachandra Aiyar :—The marriage of the 1st defendant is found invalid by the Sub-Judge. It will be so only if she was a Christian at the time of marriage. But my case is she was converted as a Hindu and then married. There is nothing to prevent reconversion. If 1st defendant was married as a Hindu, the marriage cannot be impugned either under the Christian Marriage Act or under the Hindu Law. The

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evidence on the plaintiff's side itself shows that such marriages are customary and the married couples are recognized as members of the caste; and the caste people do live in the houses of the married people. Inter-marriages between sub-castes have been held to be good. The cases cited are quoted in the judgment. When a reversioner whose real suit is only for declaration dies pending suit, the suit abates and the cause of action does not pass to the son—*Sakyahani Ingle Row Sahib* v. *Bavani Bozi Sahib.*[1]

S. Srinivasa Aiyar:—There is nothing to show that a reconversion was made. The Hindu Law books do not contain anything as to a reconversion, as such a thing was unknown to the spirit of the Hindu Law. If the person who has gone over to another religion is to be treated as a *patita* the Mitakshara says that a patita's daughter can be married only on the performance of certain purificatory ceremonies. The girl should fast the previous day, bathe in the morning and be taken without even the clothes belonging to her parents. No such thing has been done here. A patita is one within the pale of the Hindu Religion. *A fortiori* in the case of one beyond the pale of the Hindu religion, there can be no marriage without even a prayaschittam. It cannot be said that at a particular point of time the woman became Hindu all at once without any overt act. The primary condition of the validity of a marriage in Hindu Law is that the parties should belong to the same caste. Here the woman was a Christian, and even if reconversion were possible, it cannot be said that on reconversion she became a member of the same caste to which her parents belonged before conversion. It may be she becomes a member of a separate class after reconversion. There may be and are more than the four castes; Manu Ch. X, Sloka 41 to 45; see also *Sudrakamalakara.* We cannot say that all but those belonging to the twice born classes belong to the class of Sudras; see Ghose's *Hindu Law*, pp. 846, 848: nor can we say that Sudras are not governed by the Dharmasastras—*Brindavana* v. *Radhamani*[2]. No doubt the cases have decided that marriage between sub-sects of Sudras is valid; but of a member of class distinct from the Sudra class, we cannot say that she can contract a marriage valid under Hindu Law with a Sudra. The deceased

1. (1904) I.L.R. 27 M. 588.

2. (1888) I.L.R. 12 M. 72.

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was a Sudra, and the 1st defendant was not a Sudra, and a marriage between them cannot be valid.

If a marriage between two Hindus does not satisfy the essential condition required by Hindu Law, *i.e.*, that the contracting parties should belong to the same caste, no amount of recognition on the part of the members of the caste can make it valid.

T. R. Ramachandra Aiyar replied.

The Court delivered the following

JUDGMENT.—The plaintiff sues to recover possession of certain properties claiming to be the reversioner of Avudanayagam Mudaliar, the last male owner thereof from the alienees of the 1st defendant who claims to be, but according to the plaintiff is not, according to Hindu Law, his widow, as at the time of her marriage and till her husband's death she was a Christian, or, in the event of the 1st defendant's title as widow to the property being established, for a declaration that the alienations by her are not binding on the reversioners. The lower appellate Court has found that the plaintiff has established the relationship alleged by him and that the alienation by the first defendant was not made for purposes which would justify a widow under Hindu Law in alienating the property. The only question therefore for decision is whether the 1st defendant is, as the widow of the deceased, entitled to his property under the Hindu Law. In that case the plaintiff would not now be entitled to possession. The 1st defendant was a Christian before her marriage to the deceased Avudanayagam. The Subordinate Judge accepts the defence evidence that the marriage between her and Avudanayagam, a Hindu belonging tot he Kaikkolar class, was performed according to the formalities prescribed by the Hindu Law; a Brahmin priest officiated at the marriage, the Homum was performed, and the Tali was tied round the neck of the bride. They lived together as husband and wife for 30 or 40 years from the date of marriage to the death of Avudanayagam in 1901. They were living with his parents as members of one family. She lived as a Sivite Hindu like her husband. They were not treated as out-castes or put out of caste. The members of the Kaikkolar community, including the plaintiff,

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associated with them as Hindus and members of their community. The plaintiff and the other members of the caste took meals cooked by the 1st defendant. They were also worshipping at the temples. They had a boy who was treated as a Hindu. When Avudanayagam died his funeral ceremonies were performed by the plaintiff's son. These acts are mainly proved by the plaintiff's witnesses themselves. The common Purohit of the deceased and the plaintiffs, who is a Brahmin, and also the Purohit of the Tinnevelly Kaikkolar community proves that the 1st defendant took part in the religious ceremonies performed by her husband at which he was the officiating priest.

The validity of this marriage is assailed on various grounds. It is first contended that the 1st defendant was a Christian at the time of her marriage, which is therefore null and void under the Christian Marriage Acts of 1872 and 1865. This question was not raised in the Court of First Instance. If therefore the 1st defendant was a Christian when she was married, without further enquiry it cannot be decided whether the marriage took place while the Act of 1865 or 1872 was in force. But it is unnecessary to consider that question as there is no doubt that the first defendant became a Hindu when she married her husband. She was a Roman Catholic Christian before her marriage. She removed the cross from her neck. Her forehead was smeared with holy ashes. The Brahmin priest made Homum and had the Tali tied round her neck, or in other words with her husband she accepted his religion also. The question then is whether a marriage of a Hindu with a convert from Christianity is valid. It is contended by Mr. Ramachandra Aiyar that it is valid both by custom and the general law of the land. The Subordinate Judge holds that no custom has been proved to validate the marriage and even if proved, the custom cannot be upheld as repugnant to Hindu Law. The District Munsif recorded his finding in these terms: "The evidence let in in the case shows the prevalence of the practice of Hindus marrying Christian girls according to Hindu rites and such girls after their marriage following the Hindu religion." The Subordinate Judge in appeal holds that "the worthless evidence of a couple of witnesses who have no clear conception of what they are talking about is

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altogether insufficient to establish a custom." It is difficult to understand the Subordinate Judge. If he is referring to the evidence of the four defence witnesses as worthless, he has entirely ignored the evidence given by the plaintiff's witnesses themselves and the facts admitted by the plaintiff which go very far to, if they do not, prove the custom. The plaintiff (as his own first witness) admitted in cross-examination that "among Mudalies Christian girls used to be married if no other girls would be available;" and in re-examination said "if marriages of Christian girls be made according to Hindu religion, Hindus will go and take meals." He proves that one Ponnammal, daughter of Antony, a Christian, married a Hindu Pichakannu Mudaliar and succeeded to the property of her husband who died without any issue. Her sister was married to another Hindu Sivite. One Chinna Muttoo married a wife who was a Christian. His son who predeceased him was a Sivite and she succeeded to his property. He refers also to one Myvelu Mudaliar whose mother was a Christian woman. The plaintiff's son and daughter were married by members of these families. Another witness plaintiff's 5th witness, proves that one Arumazi, daughter of a Christian father Samuel, was married to a Hindu according to Hindu rites. He says she went to the Christian church before marriage; after marriage she would smear ashes to her forehead. Her daughter was married by the witness's son, a Hindu. He refers also to another intermarriage where both parties remained Hindus after marriage. He states that according to usage "if a Christian girl be married by a Hindu, she would follow her husband's religion." The plaintiff's 6th witness admits that his brother-in-law, a Hindu, married a Christian wife. This evidence given by the plaintiff's witnesses strongly supports the defence evidence which proves the usage. The evidence establishes beyond all doubt that according to usage the members of the Kaikkolar community in that locality used to marry girls who were Christians, who lived as Hindus after their marriage, were accepted as members of the community to which their husbands belonged, and were allowed rights of inheritance under the Hindu Law. The learned pleader for the respondents did not dispute these facts which prove the custom. The practice is not shown or alleged to be recent. Considering that

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the Catholic Christian community is an ancient community and their converts did not always give up caste on conversion, there is nothing improbable in the plaintiff's evidence that it is an ancient custom. The pleader for the respondent contended that the custom is so utterly repugnant to the Hindu Law as declared by the Courts and in the Dharmahsastras that it should not be recognized. The Judicial Committee has held: "Under the Hindu system of law clear proof of usage will outweigh the written text of the law" and under the Madras Civil Courts Act. Section 16 of Act III of 1873, any proved custom about marriage must be upheld.

Apart, however, from its validity as being in accordance with custom, I am also of opinion that the marriage is valid under Hindu Law. It has been settled by a uniform course of decisions in this Presidency that marriages between members belonging to different divisions of the Sudra caste are valid—see *Pandya Thelavar* v. *Puli Telavar*[1], *Inderun Valungypooly Taver* v. *Ramasawmi Pandia Thalaver*[2], where the husband was a Marava and the wife was of Parevaran, inferior class; and *Ramamani Ammal* v. *Kulanthai Nachiar* [3] where the wife was a Vellala, a superior class and the husband was of an inferior class. These decisions have since been followed. In Calcutta, Bombay and Punjab, the same view is now accepted—see *Upoma Kuchain* v. *Bholaram Dhubi*[4]; *Fakirgauda* v. *Ganji*[5]; *Haria* v. *Kansuya* [6]. In the Punjab case which had reference to a marriage between members of sub-divisions of Kshatriyas the question is fully discussed by *Chatterjee* J. But it is urgued that as the 1st defendant was a convert from Christianity she must be treated either as an out-caste or a person who does not belong to any caste, and a marriage between her and a Sudra is invalid, though marriages between different divisions of Sudras might be valid. In my opinion the contention cannot be accepted. It is difficult to find any principle on which any such distinction can be supported. The decision in *Pandeya Telaver* v. *Puli Telaver* [1] was based by *Holloway* J. on the ground that the classes spoken of are the four main castes and

1. (1863) 1 M. H. C. R. p. 478.
2 (1869) 13 M. I. A.. p. 141 at 158 & 159.
3. (1871) 14 M. I. A. p. 346 at 352.
4. (1888) I. L. R. 15 C.708.
5. (1896) I. L. R. 22 B. 278.
6. P. R. Vol. 43, p. 326.

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not the sub-divisions of these castes; and as the twice-born man is instructed to marry in his own class the fair inference is that on one not twice-born the precept is not binding. All those who are not twice-born are thus treated as Sudras. Neither the 1st defendant nor her husband belonged to the twice-born castes. The learned Chief Justice in the same case was prepared to go further and hold that the restrictions on marriage between the castes were only directory. In the Calcutta case the wife was the daughter of an out-caste and in the Bombay case the parties were Lingayets, who in theory recognize no caste as all who wear lingams are equal; and as they are not twice-born were treated as of the same caste for this purpose. It is clear therefore that by "Sudras" it was intended to include all Hindus who are not dwijas or twice-born classes. This is strictly in accordance with Manu, Chapter X., Sl. 4. That a boy taken in adoption need not belong to any caste, also supports this view—*Shamsing* v. *Santabai*[1] and *Kusum Kumari Roy* v. *Satya Runjum Das*[2]. Further, in *Mayna Bai* v. *Uttaram*[3] the children of a Brahmin woman by a European father were treated as Sudras. It is clear, therefore, that the 1st defendant must be treated as a Sudra under these decisions and the marriage is, therefore, valid under Hindu Law.

It was further contended by Mr. Ramachandra Iyer that a marriage accepted as valid and binding by the community, sect or caste to which the parties belong cannot be held to be invalid on the ground that it is opposed to the ordinary Hindu Law and the marriage in question is therefore valid even if it is opposed to the Dharmashastras. A caste for this purpose may be taken to be a combination of a number of persons governed by a body of usages which differentiate them from others. These usages may refer to social or religious observances, to drink, food, ceremonial pollution, occupation or marriage. Some of these usages may be common to others also. The caste is, so far as I know, invariably known by a distinctive name for identification; it has its own rules for internal management and has also got power of expulsion. The plaintiff and the deceased are *Kaikkolars*

1. (1907) I. L. R. 25 B. 551.
2. (1903) I. L. R. 30 C. 999.
3. (1864) 2 M. H. C. R. 196.

and they undoubtedly form a separate caste. The Tinnevelly *Kaikkolars* form a sub-division of that caste and, for our present purpose, may be treated as a distinct caste by itself.

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Though it is a rule of law that a person cannot alter the law of succession applicable to himself, it is now settled in India that he may change it by conversion to another religion, when *prima facie* he will be governed by the laws of inheritance prescribed by that religion. A Hindu convert to Mahomedanism will *prima facie* be governed by the Mahomedan laws of inheritance—*Jowla Buksh* v. *Dharum Singh.*[1] A Hindu convert to Christianity could, before the Indian Succession Act, retain his Hindu law or accept the law of the Christian community to which he has attached himself—*Charlotte Abraham* v. *Francis Abraham.*[2] This was so decided on the ground that though it is not competent to parties to create as to property any new law to regulate the succession to it *ab intestatio*, yet when there are different laws as to property applying to different classes, parties are to be considered to have adopted the laws as to property of the class to which they belong. This reasoning of course applies to a family which has changed its status without changing its religion. Thus in the case of Christians, it was held that, though by origin and in his youth a person might have been a native Christian following the Hindu law and customs as to property, it was open to him to attach himself to the East Indian class who were governed by different laws relating to property. *Charlotte Abraham* v. *Francis Abraham* [2], *a fortiori* for these reasons, applies with greater force. It is open to a Hindu who is governed by one law of inheritance to accept another law of inheritance recognized by Hindu Law. Thus it has been held that a Hindu governed by the Mitakshara Law may retain it or accept the Dayabhaga Law prevalent in the locality to which he had migrated—*Soorendranath Roy* v. *Mussamut Heeramonee Burmoneah* [3]; *Chundra Seekur Roy* v. *Nobin Soondur Roy*[4]; *Ram Bromo Pandal* v. *Kaminee Soonduree*[5], and Mayne on *Hindu Law*, Section 48.

When such is the case with the law of inheritance prescribed or allowed by the State, it may be easily imagined that greater

1. (1866) 10 M. I. A., p. 511.
2. (1862) 9 M. I. A., p. 195.
3. (1868) 12 M. I. A., p. 96.
4. (1865) 2 W. R. 197.
5. (1866) 6 W. R. 295.

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latitude was allowed in cases of marriage. In fact in the cases from the *Weekly Reporter* above referred to, in deciding whether the family had accepted a different law relating to property, the Courts laid stress on the adoption of different marriage rites. The Hindu lawyers prescribe various ceremonies to constitute a valid marriage—see Mandlik on *Hindu Law*, page 401. But those ceremonies in their entirety are seldom if ever performed. According to them Vivaha Homam and Sapthapathi are essential. But it is notorious that marriages are performed in many castes without them, and it is now settled that if by caste usage any other form is considered as constituting a marriage then the adoption of that form under those conditions prescribed by the caste with the intention of thereby completing the marriage union is sufficient. No other conclusion is possible if due regard is had to conditions in India. They show that in all questions regarding marriage, including restraints upon marriages between persons of different castes, each sect is governed by its own usage, which often varies from the accepted authorities on Hindu Law. For instance it was and is an ordinary process for a class or tribe outside the pale of castes to enter the pale and also for the lower castes to claim recognition as belonging to a higher class. If the other communities recognise the claim they are treated as of that class or caste. This process of adoption into the Hindu hierarchy through castes is common both in Northern and Southern India. If their claim is refused then they form a new sect. Sometimes classes belonging to a higher caste are denied religious communion by other classes of the same caste and if not sufficiently powerful to enforce their claims become of lower caste. Amongst such classes we often find the usages of the two castes or classes. Contact with Buddhism, Mahomedanism and Christianity has evolved various sects which have discarded many characteristics of popular orthodox Hinduism and assimilated many ideas and practise rites which are popularly supposed to appertain to the other religious systems. Conversions to and from orthodox Hinduism, Buddhism, Jainism, and in rare instances to and from Christianity and Mahomedanism, have not always or even generally been accompanied with changes in the laws of marriage and inheritance. These facts make it impossible to apply the rules of present orthodox Hinduism to such sects

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when any usage inconsistent with such rules is proved or to treat such usages as deviations from the ordinary law requiring for their validity the requisites of antiquity and continuity necessary to uphold a custom in English law. A reference to Mr. Bhattachary on *Hindu Castes and Sects*, the appendix in Mandlik's *Hindu Law*, relating to marriages page 394 to 459, and to Sir H. Risley's *Peoples of India* will illustrate this position. As to some of these sects it may be not easy to affirm that they are governed by Hindu Law. Thus the Hosainis are a class of Brahmans in Western India who are said to have adopted to some extent the Mahomedan faith and its observances. The Kuvachandis in Sindh are said to resemble the Mahomedans in their habits (Bhattachary page 118). The Jaiswars of Northern India (page 258) and the Kurmies of Behar (page 272) are said to worship Mahomedan saints, according to Mahomedan ritual. Of course a Mahomedan priest officiates. The Hindu Law has to be applied to those only who are Hindus by religion, and it is very doubtful whether some of these communities can be treated as Hindus or Mahomedans. In the absence of any statutory law they will be governed as to their marriages and inheritance by the rules of justice, equity and good conscience (see *Raj Bahadur* v. *Bishen Dayall*[1]) or in other words as laid down by the Judicial Committee in *Abraham* v. *Abraham*[2] according to the usages of the class or community. About the laws applicable to them I entirely agree with Sir James Stephen in his opinion thus recorded :" My own opinion is that if a considerable body of men, bound together by common opinions and known by a common name, appeared to be in the habit of celebrating marriages according to forms and on terms unobjectionable in themselves, the Courts ought to recognise such marriages as valid, though in any particular case their might be circumstances which do not suggest themselves to my mind and which could invalidate the marriage. The fixity of the sect, the propriety of its forms, and the propriety of its terms, would all have to be considered by the Court. I think in short that though it cannot be affirmed with confidence on the one hand, that all persons who are not Hindus, &c., can marry in any way which sufficiently expresses their intentions

1. (1882) I. L. R. 4. A., p. 343. 2. (1862) 9 M. I. A. 195.

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and on whatever terms they think proper it may also be affirmed that a marriage between persons so situated would be valid, unless circumstances existed which led the Courts to treat it as invalid; but if pressed to say what those circumstances are, I should be unable to answer the question, unless I had the facts of some particular case brought fully before me."—Proceedings of the Legislative Council, pp. 77-78, *Gazette of India* Supplement, January 27, 1872.

Between these classes who occupy the borderland between Islam and Hinduism and those castes who confirm strictly to the rigorous tenets of extreme Brahminism, lie various classes or castes, whose sole common bond or union is that they are all classed as Hindus, and are governed by Hindu Law.

Though Hindus, they are widely divergent in their religious belief and conduct, and their usages are in many respects utterly repugnant to orthodox Brahminism. Sir H. Risley's "Peoples of India" and Mr. Bhattacharya's "Hindu Castes and Sects" may be usefully consulted for information about sects which originated in religious difference. Sir H. Risley's "Peoples of India" shows how sects are formed, based not only on community of religion but also on community of function. Intertribal marriages have been responsible for the formation of many castes. So also migration and changes of custom. I shall refer to some of these cases which have a bearing on the question before us. The sects of Lingayets (Bhattachary, page 396) Ram Sanchi (page 48) Dadupanthi (page 446) Chaitanya (page 464) Swami Narayan (page 474) Balattari (page 493) Jains (page 550) Kabir (page 496) and Sikhs (page 595) recognise no caste, no Brahman supremacy, and many of them receive converts from all castes. The Bhinuhar Brahmans of Behar (p. 109) and the Ooriya Poojari Brahmans (page 62) are believed to have been of low caste. Certain classes in Assam are supposed to have been made Brahmans by royal edicts with the result that when their ladies marry pure Brahmans they do not interdine with their maternal kindred (page 58). Similar promotions to the Kshatriya and other castes were made within the memory of men still living. (Risley, App. CXXXI.)

Emigrants often form castes with their status lowered, but emigration also enables men of a lower caste to attain caste

promotion. See Risley page 90. Similarly the offspring of the union between Brahmans and lower castes are in some places treated as Kshatriyas--Risley, Ap. CXXXI and page 83. For other instances see page 81. Clans who were Jats a few years ago are now Rajputs on account of changes in their customs and the converse practice also is said to be no less common, Ap. CXXXI.

There are classes of Jats who claim to be Kshatriyas though they wear no holy thread (Bhattacharya p. 145). Among the Agarwalls the wearing of the sacred thread depends upon their occupation (p. 206). A Kolita in Assam wears a sacred thread when he becomes "a big man" (p. 196). Instances of Brahmins ceasing to belong to that caste when they take to agriculture are given by Sir D. Ibbetson, (Ap. CXXX Risley.) So also it is noted that a Kshatriya in that locality becomes a Kayastha when he becomes a clerk. This divergence from the Shastras is observable in a greater degree in Southern India. This is only natural, for as rightly pointed out in the Census Report of 1901, Madras, Vol. 15, Part 1, the essential difference between the castes of this Presidency and those of Upper India is that the ideas of the Aryans and the rules of Manu have affected the people of this Presidency less deeply than those north of the Vindhyas, p. 128. See the very instructive observations of Mr. Mayne on this point.—Section 47, p. 53, 6th Edition.

In Southern India many castes, numbering over a million, deny the superiority or the sacerdotal authority of the Brahmins. See Madras Census, p. 139. Many others, over 6 millions, follow practices which according to the Shastras place them beyond the pale of Hinduism (Groups 9 and 10, p. 139.) We also find that many castes claim a position far higher than that which the Hindu Society in general is inclined to accord to them. A few castes claim to be classed as Brahmins. The Pallis or Vanniyas, the Shanars and some of the Balijas claim to be Kshatriyas; the Komaties, the Mutans and some few Vellalas state they are Vasiyas—(p. 130) Madras Census Report, 1901. Sometimes, as in the case of Jatapur, entirely new castes are formed, p. 131. As in Northern India, a change in the occupation sometimes creates a new caste. A common occupation sometimes combines members of different castes into a distinct body which becomes a new

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caste. Migration to another place makes sometimes a new caste. For instances, see p. 132. This tendency to divide into sects or divisions, to form new sects with their own religious and social observances, is a characteristic feature of "Hinduism" and, in my opinion, it is not for the Courts to interfere with it. If a community have consciously accepted different religious idea and rights it is not for the Courts to insist upon their adherence to their abandoned ideas and practices.

Most of these sects arose within a recent date; some of them only within the last century. The Brahmo Samaj became a definite sect only about 1830. The Balahari sect, "the most important of whose cult was the hatred that he taught his followers to entertain towards Brahmins," (p. 493 Bhattacharry) became a recognized sect only later, and the Arya Samaj only within the last few years. The process is still going on. Sir H. Risley says, p. 75, that "it is a matter of observation at the present day * * * that the adoption of new occupation or of changes in the original occupation may give rise to sub-divisions of the caste which ultimately develop into entirely distinct castes.

The offspring of the sexual unions between members of higher and lower castes becoming members of different castes is also said to be going on at the present time—p. 82, 84; also p. 81. Sir. D. Ibbetson states that in the Himalayas any one can observe caste growing before his eyes, the priest into a Brahmin, the peasant into a Jat and so on, and he also says that the process was also more or less in course at a period not very remote from the present day in Kangara where the proudest and most ancient Rajput blood in the Punjab is to be found. App. p. CXXXI. He also states that this process of forming separate castes "is going on daily around us and it is certain that what is now taking place is only what has always taken place during the long ages of Indian History." I entirely agree. It is impossible to hold that marriages performed amongst such communities are invalid on account of nonconformity with the accepted tenets of orthodox Hinduism laid down by the Courts. To these communities it is impossible to apply a marriage law which is based on the immutability of castes and on ordinances which prescribe many of their most cherished practices. The castes

referred to are only a few selected for illustration, and their usages cannot be treated as exceptions to any general rule. It appears to me, therefore, that the Hindu Law to be administered by the Courts consists of the Shastras which claim divine sanction and are followed by the Brahmins generally and also of the usages or approved habitual practices of these communities, whose caste status depends upon the degree of conformity of their usages to the Shastras and if according to the usage of the community a marriage is valid or the community recognize a marriage as valid then, in the absence of any statutory prohibition, I fail to see why it should not be recognized as valid even without the requisites of a valid custom in derogation of what may be styled the ordinary Hindu Law unless it offends against rules which would render any other marriage invalid.

It is of course open to a community to admit any person, and any marriage performed between him and any member would, in my opinion, be valid if it complied with their usage though it ma be opposed to the Dharma Shastras.

Sir James Stephen's opinion on this question certainly seems reasonable. He said that if it were not for English Courts and English Law, no difficulty would have risen: "New sects which might have arisen would have adopted their own usages and would have lived or fled according to the degree of vitality they might contain. Their marriage and other customs would, if they lasted, have taken their place amongst the other customs of the country and would have been treated as equally valid with those which are in more general use. Why should we interfere with this state of things? Why should we determine at all what is or is not orthodox according to Hindu notions? Why should we interfere with the natural course of events? There can, I imagine, be but one answer to these questions, namely, that no course can be more unwise, more opposed to our settled policy, more unpopular with the natives, or more unjust. All that can be said for it is, that it is more or less favoured by certain analogies which may be drawn from a part of English Law which has less in common with India than almost any other part of it. It is upon these grounds, that I think it impossible to lay down, beforehand, with any approach to completeness,

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all the essentials to the formation of a new and valid custom as to marriage. It is impossible to affirm, in general, that the mere fact that a Hindu sect is of recent origin, and that it has adopted forms of celebrating marriage differing from those commonly in use, are not sufficient to prevent such marriages from being held valid by Hindu Law as interpreted and administered by our Courts." *Gazette of India* (January 27th, 1873, Supplement, p. 81.) This is in strict conformity with the spirit of Hindu Law. The legal rules put forward by the sacred writers are primarily intended only for those who accept in theory, the religious belief, the religious, social and moral obligations which form the foundation of that system. On the others, it is binding only by adoption, and though it will be presumed that as Hindus they are governed by that system of law, circumstances may exist to throw the burden of proof on the parties asserting that they have adopted any specific rule of Hindu Law. See *Fanindra Deb Raikat* v. *Rajaswar Dass* alias *Fanindra Deb Raikat* [1] where the Judicial Committee held that where a family were shown to have become Hindus in part only recently, there is no presumption that they adopted the law of adoption. Where, therefore, the religious and legal consciousness of a community recognizes the validity of a certain marriage it follows that it cannotbe discarded on account of its repugnance to that system of law.

Whether the marriage is valid or not according to the caste rules, it is for the caste itself to decide. So far as ancient history and modern usages go, marriage questions have always been settled by the caste itself, and the validity of a marriage between the members of a caste who recognize it as binding has not been questioned by outsiders though the caste itself may be lowered in their estimation when such marriages are repugnant to their notions of morality.

Where, therefore, a caste accept a marriage as valid and treat the parties as members of the caste it would be, it appears to me, an unjustifiable interference for the Courts to declare those marriages null and void.

It does not follow that a marriage opposed to the usages of the communities and not recognized by them would be invalid.

1. (1885) 12 I. A. 72 s.c. I. L R. 11 C. 463.

Muthusaw Mudalia v. Masilama Mudaliar

A marriage, whatever else it is, *i. e.*, a sacrament, an institution, is undoubtedly a contract entered into for consideration with correlative rights and duties. The Civil Courts Act only requires that so far as Hindus are concerned its validity must rest upon Hindu Law, *i.e.*, as explained above the law of the Dharmasastras as distinguished from caste rules or the caste law. If it is not recognized by the caste or caste rules the parties may cease to belong to the castes whose usages they have violated and who would therefore expel them. There is nothing to prevent a man from giving up his caste or community. He is bound by the caste rules only on account of his voluntary submission, and therefore if the marriage is valid under the ordinary Hindu Law they will be legally married even if such marriage is opposed to the rules of the caste or community to which they belong.

In fact in the case before us there are sub-divisions of the Kaikkolar community inter-marriages between whom are not allowed, but it is not contended that such marriages would be invalid in a Court of Law though they may entail expulsion from those sub-divisions.

I am, therefore, of opinion that this marriage is valid (1) on the ground of custom, (2) because it is in conformity with Hindu Law which does not prohibit marriages between any persons who are not Dwijas or twice-born persons, (3) because when the caste of which the parties are accepted members recognize a marriage as valid then it is legal marriage under Hindu Law.

I would, therefore, reverse the decree of the Sub-Judge and dismiss the suit for possession and restore that of the Munsif.

As, however, the alienation has been found to be not binding on the reversioners, there must be a declaration to that effect. It was contended that on the death of the original plaintiff the suit abated so far as the declaration is concerned. But as the suit for declaration was brought by the plaintiff not on his behalf only but also on behalf of the reversioners, the right to sue survives and the suit does not abate. Each party will bear his own costs throughout.

Abdur Rahim J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Munro.

Sri Raja Chelikani Rama Rau and others .. Appellants* in S. A. No. 1434 of 1904 (*Claimants*)

and

Sri Raja Ballapragada Venkata Subba Row and others .. Appellants in S. A. No. 1435 of 1904 (*Claimants and 2nd claimant's legal representatives.*)

v.

The Secretary of State for India represented by the Dist. Forest Officer, Godavari .. Respondent (*Defendant in both.*)

Rama Rau v. Secretary of State.

Crown—Ownership in waste lands and islands—Godavari delta lands—Limitation Act, Art. 149—Limitation against the Crown—Onus—Forest Act—Notification constituting a reserved forest.

The rule of English law is that islands arising out of the sea belong *prima facie* to the Crown ; and the same rule would apply in India in the absence of local usage or statutory enactment to the contrary, though the reasoning on which it was sought to be based will not hold good after—*Reg* v. *Keyn.*[1]

Where a person has proved possession of the land notified by the Government as a reserved forest as against the Crown for 20 years prior to the notification, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced, or became adverse, within 60 years before the notification.

[*Secretary of State* v. *Vira Rayan*[2], *Secretary of State* v. *Barotti Haji*[3], *Secretary of State* v. *Kota Bapanamma Garu*[4], referred to.]

Second appeals from the decrees of the District Court of Godavari in A. S. Nos. 591 and 593 of 1903 presented against the decrees of the Court of the Forest Settlement Officer, Kistna &c. Districts, in Claims Nos. 1 and 2 of 1902 respectively.

T. Subrahmanya Aiyar for appellant.

The Government Pleader (*E. B. Powell*) for respondent.

The Court delivered the following

JUDGMENT:—These are appeals by the claimants against the decrees of the District Court of Godavari in Appeal Suits

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*S. A Nos. 1434 and 1435 of 1904. 30th September 1909.

1. (1876) 2 Ex. D. 63.
2. (1885) I. L. R. 9 M 175.
3. (1892) I. L. R. 15 M. 315.
4. (1895) I. L. R. 19 M. 165.

Nos. 591 and 593 of 1903 confirming the decisions of the Forest Settlement Officer of Godavari in Claims Nos. 1 and 2 of 1902. These were claims by the Mallavaram and Nadavapalli Estates, respectively, to land at the mouth of the Godavari which Government, by a Notification dated the 2nd December 1901, proposed to form into a reserved forest. Both claims being intimately connected were dealt with by the lower appellate Court in one judgment, and in this Court the same arguments were put forward on behalf of both sets of claimants. It was first contended that, as the appellants were in possession at the date of the notification the lands should not have been notified as a reserved forest. This contention was properly dealt with and overruled by the Forest Settlement Officer in paragraph 7 of his judgment in Claim No. 1. The appellant's pleader did not attempt to argue the matter before us, but contented himself with stating this objection.

Rama Rao v. Secretary of State.

It was further contended that the right of the Crown would be barred if the claimants succeeded in proving 12 years' adverse possession prior to the coming into force of the limitation section of Act IX of 1871 and if Madras Regulation II of 1802 applied to suits to enforce public rights. The contention was based upon certain remarks in *Secretary of State* v. *Vira Rayan*[1]. The remarks are at pages 185 and 186 of the report and are as follows:—

" The clause of Act XV of 1877 which precluded the revivor "of a right to sue barred was not confined to that Act but was ex- " tended to Act IX of 1871. The words are: 'All references to the " 'Indian Limitation Act, 1871, shall be read as if made to this Act, " 'and nothing herein or in that Act contained shall be deemed " 'to revive any right to sue barred under that Act or under any " 'enactment thereby repealed.' Had this stood alone and had we "come to the conclusion that Regulation II of 1802, S. 18, " applied to public rights, we should have agreed with the Judge " that 12 years' adverse possession woul have barred the right of " the Crown to sue." When these remarks were made it was apparently thought that Regulation II of 1802 was repealed by Act IX of 1871. Regulation II of 1802 was not repealed by Act IX of 1871. This was discovered in the course of the argument

1. (1885) I. L. R. 9 M. 175.

Rama Rau v. Secretary of State.

before us and the contention was then dropped. We have, however, referred to the matter because it seemed desirable to point out the misconception on which the remarks in *Secretary of State* v. *Vira Rayan*[1] were based. It is now clear that if the claimants had to establish a title by adverse possession they would have to prove such possession for 60 years before the notification.

The main portion of the land in dispute lies between Hope Island on the north and a channel called Neelarevu on the south. The District Judge finds that the claimants have been in possession since 1882 of the portions of this tract claimed by each of them.

The District Judge has further found that this tract together with that portion of Yalakalatippa which is shown in Exhibit I, consists of islands formed in the bed of the sea at the mouth of the Godavari. This finding is attacked, but there is, in our opinion, evidence to support it, and we must accept it. No doubt the District Judge is possibly in error in assuming that Exhibit I, a map publised in 1842, correctly represents the outlines of the coasts and adjacent islands in that year. The survey on which the map is based may reasonably be supposed to have been made some time before 1842, and between the survey and 1842 some changes in the outlines may have occurred. This possible error, however, in no way affects the correctness of the finding now in question inasmuch as the finding applies to the portion of Yalakalatippa shown in Exhibit I as well as to the land subsequently formed.

The District Judge has next found that the title to the islands in question originally vested in the Crown. It is admitted before us that all the islands were formed within 3 miles of the main land. The rule of English law is that islands arising out of the sea belong *prima facie* to the Crown—*vide* the *Law of Waters*, Coulson and Forbes, 2nd Edition, page 31. In the absence of local usage or statutory enactment to the contrary he same rule would apply in British India—vide *Secretary of State for India* v. *Kadirikutty*[2]. It is argued, however, that the rule of English Law abovementioned no longer holds good owing to the

1. (1885) I.L.R. 9 M. 175.
2. (1890) I.L.R. 13 M. 369-376.

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decision in *Reg.* v. *Keyn.*[1] The reason generally given for the rule is that the King is the owner of the soil beneath the sea. Since the case of *Reg.* v. *Keyn*[1] this reason can apparently no longer be resorted to in support of this rule. But that circumstance by itself is no reason why the ancient rule should not continue to be followed. If it were necessary to find support for the rule it could, no doubt, be found in the well established rule of the common law of this part of India that waste land which is not the property of an individual or a community belongs to the Government, or it may be correct to regard the title of the Crown as similar to the title by Escheat as suggested in *Secretary of State for India* v. *Kadirikutty*[2], with reference to the observations of the Privy Council in *The Collector of Masulipatam* v. *Cavaly Venkata Narrainappa*,[3] "private ownership not existing, the State must be owner as ultimate lord."

The District Judge then holds that as the title was originally in the Crown the claimants must prove adverse possession for 60 years. Here the District Judge is clearly wrong. Though the title was originally in the Crown, still, as the possession of the claimants for 20 years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i.e.*, within 60 years before the notification.—*Secretary of State* v. *Vira Rayan*[2]; *Secretary of State for India* v. *Bavotti Haji*[3], *The Secretary of State for India* v. *Kota Bapanamma Garu*[4]. As the several islands were formed gradually and probably appeared and became capable of occupation at different times, it may be that there is proof that some, if not all, of them came into existence as land capable of occupation within 60 years prior to the notification. In the case of such land the title of the Crown must be a subsisting title. In the case of lands which came into existence as land capable of occupation more than 60 years prior to the notification, the Crown must show by evidence that it had a subsisting title at some time within that period.

We must, therefore, ask the District Judge to return a finding as to whether the Crown has a subsisting title to the whole or

1. (1876) 2 Ex. D. 63. 2. (1885) I.L.R. 9 M. 175. 3. (1860) 8 M.I.A. 500 at 525.
4. (1892) I. L. R. 15 M. 315. 5. (1895) I. L. R. 19 M. 165.

Rama Rau v. Secretary of State.

any portions of the claim land lying between Hope Island on the north and Neelarevu on the south.

Further evidence on both sides on this question may be adduced before the District Judge as the true point in issue was not correctly understood by the parties at the trial. The finding should be returned within five months from date of the receipt of this order, and ten days will be allowed for filing objections.

The remaining land in dispute consists of the plots B and C in the plan Exhibit II. As to these plots the finding of the District Judge is that they arose as islands out of the sea subsequent to 1842, and we are of opinion that there is evidence to support the finding. The plots thus came into existence within 60 years of the notification. The title to them was originally with the Crown and there has not been sufficient time for that title to be lost. The claim with regard to these plots was therefore rightly rejected.

In compliance with the above order, the District Judge submitted the following

* * *

FINDING :—"I find * * that the Crown has no subsisting title to the whole or any portion of the claim land lying between Hope Island on the north and Neelarevu on the south."

These second appeals coming on for final hearing after the return of the above finding, the Court delivered the following

JUDGMENT :—We accept the finding and allow the claim to the lands dealt with in this finding. The decrees of the Courts below will be modified accordingly.

The appellant in S. A. No. 1435 of 1904 will get full costs throughout.

In S. A. No. 1434 of 1904 the appellant has succeeded in part only. Each party will pay and receive proportionate costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Rahim.

M. Krishna Aiyar .. Appellant*
(*Plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector of Tinnevelly .. Respondent
(*Defendant*).

Krishna Aiyar v. Secretary of State.

Limitation Act, Art. 149—*Adverse possession against the Crown—Gramanattam—Onus.*

The bare classification of lands as *gramanattam* by the Revenue officials will constitute at the most an assertion of title and nothing more.

In a suit against the Crown for recovery of possession of lands claimed by the Crown, if the plaintiff proves long possession on his part (*e. g.*, as in this case twenty and forty years in respect of the suit items) even though the proof does not extend to sixty years, it is upon the Crown to prove that it had possession within the statutory period, and, in the absence of such proof, the plaintiff is entitled to a declaration that he is the sole owner. [*Secretary of State* v. *Kota Bapanammagaru*, [1] *Muthaya Chetty* v. *Secretary of State*[2], *Hanmanth Rao* v. *Secretary of State*[3], *Haidar Khan* v. *Secretary of State for India*[4], *Gangaram* v. *Secretary of State*[5] referred to ; *Katti Mahammad Mira* v. *Secretary of State*[6] distinguished.)

Second Appeal from the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 267 of 1905 presented against the decree of the Court of the Additional District Munsif of Tinnevelly in O. S. No. 132 of 1904.

The facts of the case sufficiently appear from the judgment.

M. B. Dorasami Aiyangar for appellant.

The Govt. Pleader (*C. F. Napier*) for respondent.

M. B. Doraisami Ayangar :—Possession for 30 years throws the onus of disproving title on the Government. Full sixty years adverse possession need not be proved—S. A. 1434 and 1435 of 1904[7], *The Secretary of State* v. *Kota Bapanammagaru* [1], *Muthayya Chetty* v. *Secretary of State*[2], *Nawab Ajujuddin Ali Khan*[8], *Haidar Khan* v. *The Secretary of State*[4]. There is no presumption that the Government has title to all village sites, but even if there is, the burden is on the Government to show when

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* S. A. 576 of 1906. 15th September 1909.

1. (1895) I.L.R. 19 M. 165.
2. (1898) I.L.R. 22 M. 100.
3. (1900) I.L.R. 25 B. 287.
4. (1908) I.L.R. 36 C. 1.
5. (1895) I.L.R. 20 B. 798.
6. (1903) 13 M. L J. 269.
7. (1909) 20 M. L. J. 66.
8. (1904) I. L. R. 28 M. 69.

Krishna Aiyar v. Secretary of State.

the possession began—S.A. 1434 and 1435 of 1904. The entry in the settlement register classifying these plots as village sites cannot confer title on the Government. *Kattai Mahammad Mira Mohideen* v. *Secretary of State*[1] does not lay down any general proposition of law. In this case, the Government classified the land as village site in 1874 behind the back of the plaintiffs and an entry under such circumstances in their own registers cannot bind the plaintiffs. It is not sufficient for the defendant merely to rebut the presumption of ownership that arises from possession; the defendant must also prove better title in himself before the plaintiff could be evicted—*Mahammad Meera Mohideen* v. *The Secretary of State for India*[2]; *Hanmant Rao* v. *Secretary of State*[3]; *Gangaram* v. *Secretary of State*[4]; *Ismail Ariff* v. *Mahomed Ghous*[5].

The mere fact of previous possession entitles a party to a declaration against a party who can show no better title—*Mustappa Saheb* v. *Santa Pillai*[6]; *Narayana Rao* v. *Dharmachar*[7].

The Government Pleader (*C.F. Napier*):—The presumption is that all unoccupied lands vest in the Government. Board's Standing Order No. 21, p.3 (Ed. 1907) regulates the method of granting it to private parties. In this case the kurnum was the party that originally encroached upon the village site. He being the party who was bound to report of such encroachments his possession cannot avail to the plaintiffs for any purpose. The plaintiff seeks to get his title declared. He must prove it strictly—*Rassonada Rayar* v. *Sitharama Pillai*[8]. The cases cited are mostly Zamindari cases, and obviously have no application to the present case. *Haidar Khan* v. *The Secretary of State*[9] indicates the nature of previous possession that is necessary to raise a presumption of title.

M. B. Doraisamy Aiyangar:—The rule as to presumption of ownership from possession applies to all cases. S. 110 of the Evidence Act makes no reservation in favour of any class of cases. There is no presumption that village sites belong to Govern-

1. (1903) 13 M. L. J. 269.
2. (1895) 10 B. L.R. 571.
3. (1900) I.L.R. 25 B. 287.
4. (1896) I.L R. 20 B. 798.
5. (1893) I.L.R. 20C. 834 ;S.C. 20 I.A.99.
6. (1899) I.L.R. 23 M. 179.
7. (1902) I.L.R. 26 M. 514.
8. (1864) 2 M.H.C.R. 171.
9. (1908) I.L.R. 36 C. 1.

Krishna Aiyar v. Secretary of State.

ment. *Hanumanta Rao* v. *Secretary of State for India*[1], *Gangaram* v. *Secretary of State*[2], are cases of village sites. *Rassonada Rayar* v. *Sithrama Pillai*[3] was prior to the Evidence Act and is also dissented from in *Pemraj Bhavani Ram* v. *Narayan Shivram Kristi*[4] which is cited with approval in all the subsequent cases.

The Court delivered the following

JUDGMENT:—It is found that the plaintiff has proved possession of item 1 in himself and his vendor for 30 years and of item 2 in himself for 40 years. The defendant, who is the Secretary of State for India in Council, has failed to establish his title to the land, or any possession within 60 years before suit. The only circumstance put forward to show a title in the defendant is the fact that at the settlement in 1874 the Revenue authorities classed the items as Nattam Poramboke. This at the utmost was an assertion of title, and is not by itself sufficient to prove the title of the defendant. The judgment of this Court reported in *Kattai Mahammad Meera Mohideen* v. *The Secretary of State for India in Council*[5] has been entirely misunderstood by the Subordinate Judge. That judgment does not lay down that the mere classification by Government of the lands as Nattam Poramboke has any legal effect whatever except in so far as it may be regarded as an assertion of title. It may be regarded as settled law that in circumstances like the present the possession of plaintiff throws upon the defendant the burden of proving that he has a subsisting title—vide *The Secretary of State for India* v. *Kota Bapanamma Garu*[6]; *Mutthayya Chetti* v. *The Secretary of State for India*[7]; *Gangaram Chinna Patel* v. *The Secretary of State for India in Council*[8]; *Hanumanta Rao* v. *The Secretary of State for India*[1]; and this he has failed to do. The plaintiff is clearly entitled to some relief. It is contended that the only declaration that the plaintiff can, in the circumstances of this case, have, is that he is lawfully entitled to possession of the land. It is pointed out that this is the declaration that was given in *Ganga Ram Chinna Patel* v. *The Secretary of State for India in Council*[8] and *Hanumanta Rao*

1. (1900) I.L.R. 25 B. 287.
2. (1895) I.L.R. 20 B. 798.
3. (1864) 2 M. H. C. R. 171.
4. (1882) I.L.R. 6 B. 215 (F. B.)
5. (1903) 13 M.L.J. p. 269.
6. (1895) I.L.R. 19 M. 165.
7. (1898) I.L.R. 22 M. 100.
8. (1895) I.L.R. 20 B. 798.

Krishna Aiyar v. Secretary of State.

v. *The Secretary of State*[1]. In the former case the plaintiff had only proved possession for 10 years which was insufficient to give him a title against any one who might be the true owner, and on the ground that he had not proved his title a declaration of title was refused. The declaration that he was lawfully entitled to possession was given because there was, as there is in the present case, a prayer in the plaint for any other relief to which the plaintiff might be entitled because the facts brought the case within the ruling of their Lordships in the Privy Council case in *Ismail Ariff* v. *Mahomad Ghouse.*[2] In that case the possession proved was for less than 12 years and apparently on that ground the words "lawfully entitled to possession" were substituted for the words "sole and absolute owner" which appeared in the decree of the High Court. In *Hanumanta Rao* v. *The Secretary of State for India*[1], also the plaintiff's possession only extended to 10 years. In the present case the plaintiff's own possession of item 1 extends to 20 years, and of item 2 to 40 years, and such length of possession is sufficient to make out a title against any one including the Secretary of State, the latter having failed to prove a title or possession within sixty years. It is not contended that in order to prove his title against the Secretary of State the plaintiff is bound to prove 60 years' possession, and such a contention would be untenable—vide *The Secretary of State for India* v. *Kota Bapanamma* [3] and *Haidar Khan* v. *The Secretary of State for India in Council* [4]. The plaintiff will therefore have the declaration prayed for as to items 1 and 2 with costs throughout, and the decree of the lower Courts will be modified accordingly.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Venkatrama Iyer and another .. Appellants* (*Plaintiffs*)

v.

The Secretary of State for India in Council represented by the Collector of Tanjore and another .. .. Respondents. (*Defendants.*)

Venkatrama Aiyar v. Secretary of State.

Limitation Act, Art, 149—Proof of possession for 30 or 40 years—Onus, shifting of—Mirasidars' claim to a village tank in the Tanjore District.

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* S. A. 637 of 1907. 30th November 1909.

1. (1900) I.L.R. 25 B. 287.
2. (1895) I.L.R. 20 C. 834.
3. (1895) I.L.R. 19 M. 165.
4. (1908) I.L.R. 36 C. 1 (P.C.).

Venkatrama Aiyar v. Secretary of State.

Possession for 30 or 30 years is sufficient to shift the onus on Government of showing that they have been in possession at some time within 60 years prior to suit.

Held also on the evidence that the plaintiffs, Ekabogam (sole) Mirasdars of a village in the Tanjore District, have established their ownership of a tank and its banks in the village (the tank being one used for drinking and bathing purposes) as against Government.

Second Appeal from the decree of the Subordinate Judge's Court of Tanjore in A. S. No. 1382 of 1905, presented against the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 347 of 1904.

The facts of the case are sufficiently given in the judgment.

T. R. Ramachandra Aiyar, *S. Srinivasa Aiyar* and *M. Subramania Aiyar* for appellants.

The Government Pleader (*C. F. Napier*) for the respondent.

T. R. Ramachandra Aiyar.—Onus shifts if possession even for less than the statutory period of sixty years is proved. A presumption of ownership arises from long possession.—*Secretary of State for India* v. *Bavotti Haji*[1]; *The Secretary of State for India* v. *Kota Bapannamma Garu*[2]; S. A. 1434 of 1904[3] and S.A. 576 of 1906[4] (unreported); *Hanmantarao* v. *The Secretary of State*[5]; *Bhagavan Singh* v. *The Secretary of State*[6]. Cutting timber, grazing cattle and collecting mountain produce have been held to prove ownership—*Secretary of State for India* v. *Nellakutti Siva Subramania Tevar*[7]. Exclusive enjoyment of fishery raises a presumption of ownership to the soil—*Hambury* v. *Jenkins*[8]; *Attorney-General* v. *John Emerson*[9]. Acts of repair show ownership. Poramboke and produce thereon in Mirasi villages in Tanjore District belong to the Mirasdars —Huddleston's Papers on Mirasi Rights, pp. 553, 565; Tanjore District Manual, pp. 373 to 375; Tanjore District Gazetteer, p.189. Poramboke does not necessarily mean waste—Tanjore District Manual, p. 661; Huddleston, pp. 373, 555, 185, 220, 429, 565. *Secretary of State for India* v. *M. Krishnayya*[10] does not apply as it deals only with waste. Classification as poramboke does not necessarily show that land so classed is Government property—S. A. 576 of 1906 (unreported)[4].

Government Pleader (*C. F. Napier*).—Porambokes belong to Government—*The Secretary of State for India* v. *M.*

1. (1892) I.L.R. 15 M. 315, at 317, 321.
2. (1895) I.L.R. 19 M. 165.
3. Now reported in (1909) 20 M.L.J. 66.
4. Now reported in (1909) 20 M.L.J. 71.
5. (1900) I.L.R. 25 B. 287.
6. (1906) 10 Bom. L. R. 571.
7. (1891) I.L.R. 15 M 101 (P. C).
8. (1901) 2 Ch. 401, 411.
9. (1891) A.C. 649.
10. (1905) I.L.R. 28 M. 257.

Venkatrama Aiyar v. Secretary of State.

Krishnayya[1]; *Madathapu Ramayya* v. *The Secretary of State.*[2] Gathering flowers and taking fish are simply privileges, and privileged enjoyment cannot be adverse. One isolated act of repair as in this case will not show ownership of the tank repaired.

[Possession and enjoyment for less than the statutory period raise a strong presumption of ownership—*Mahomed Ali* v. *The Secretary of State for India*[3]—ED.]

The Court delivered the following

JUDGMENT :—In this case the plaintiffs prayed for a declaration that they are the owners of the tank described in the plaint; and for recovery of its possession, and for damages against the Secretary of State for India because his agent the Collector had leased out the aloe flowers on the banks of the tank and thus invaded their rights. The Courts below have found against the plaintiffs' title, and they appeal. Their claim is founded on two grounds, *viz.*, (1) that as sole Mirasidars of the village they have by immemorial custom an exclusive right to all the Poramboke lands of the village; and (2) that they have been in exclusive possession and enjoyment of the tank for over the statutory period adversely to the Government and they have thus acquired a title to it by prescription. We think the title of the plaintiffs by adverse possession is established by the evidence. No doubt their enjoyment of the aloe flowers and of the fishery in the tank for the past 35 or 40 years if it stood alone would not indicate ownership, because, in fact, Government everywhere and especially in mirasi villages, allows the villagers to take fuel and grass, and wild fruits and flowers from the Poramboke and other waste lands of the villages and allows them in many cases to enjoy also the fish of small tanks. The non-interference of Government with such enjoyment does not imply a denial of the ownership of Government or an abandonment by Government of its ownership—*The Secretary of State for India* v. *M. Krishnayya.*[1] But in the present case we have much more. It is proved by the evidence that the predecessor in interest of the plaintiffs expended large sums in clearing silt out of the tank and constructed masonry sluices in it for regulating the inflow and outflow of its water. These are acts of a kind which raise

1. (1905) I.L.R. 28 M. 257 at p. 285. 2. (1903) I.L.R. 27 M. 386, 393.
3. (1908) I.L.R. 36 C. 1. (P. C.); 18 M. L. J. 549.

a presumption of ownership in the person doing them and are sufficient to shift to the defendant the burden of explaining away the acts and the ordinary inferences arising from such acts, and showing a title in the Government. There is not, however, a shred of evidence, oral or documentary, adduced by Government in this case. There is merely the allegation in the written statement that the tank is entered in the revenue and settlement registers as Government Poramboke. Such entry is, of course, insufficient to prove that the tank is in fact the property of Government. The Collector, examined on interrogatories, admits that the Government has never at any time executed any repairs to the tank. He does not say that they have ever exercised any act of ownership in regard to it nor does he attempt to explain how it happens that the plaintiffs, if not owners of the tank, have cleared out its silt and have constructed masonry sluices in it. He does not say that these acts were done with the permission of the Revenue authorities, or even that such acts are in that District often allowed by Government at the request of the villagers as the upkeep of the tank is to their advantage. The record gives no idea of the size or character of the tank, but the Government Pleader and Vakil for the plaintiffs state that it is a small village tank about 1½ acres in extent, not used for irrigation, but used for drinking and bathing purposes. Such a tank may well be the property of the villagers in common, or of private persons.

We think that the evidence on the record points to the conclusion that the plaintiffs have been in possession and enjoyment of the tank adversely to Government for 30 or 40 years, and this is sufficient to shift to Government the onus of shewing that Government has been in possession at some time within 60 years prior to the suit. There is no evidence that Government was ever in possession if it. We must, therefore, hold that the plaintiffs' possession should be presumed to have continued for more than the statutory period and that they have established their title by prescription—*Anangamanjari Chowdrani* v. *Tripurasundari Chowdrani*[1]; S. A. 1434 of 1904[2], and S. A. 576 of 1906[3] not yet reported. In this view it is not necessary to go into the question of the plaintiffs' alleged right as Mirasidars.

We declare the plaintiffs' right to the tank and its banks as against thedefendants and give them a decree for its recovery

1. (1887) I.L R. 14 C. 740 (P.C.) at 748.

2. Now reported in (1909) 20 M. L. J. 66. 3. Now reported in (1909) 20 M.L.J. 71.

Venkatarama Aiyar v. Secretary of State.

and for mesne-profits at the rate claimed, Rs. 8 per annum from 1901 until delivery of possession or 3 years from this date whichever event first occurs, with costs throughout against 1st defendant.

Three month's time is allowed to the 1st defendant to satisfy the decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Kayarunisa Begum .. .. .. Appellant*

v.

Sakina Bivi and others .. .. Respondents.

Kayarunisa Begum v. Sakina Bivi.

C. P. C. (XIV of 1882) S. 505—Appeal—Order refusing to accord sanction for appointment of Receiver.

No appeal lies from an order of the District Judge refusing to accord his sanction for the appointment of a Receiver under S. 505 C. P. C. (1882).

Appeal from the order of the District Court of Tanjore in O. P. No. 343 of 1908 in O. S. No. 52 of 1907 on the file of the Sub-Court of Mayavaram.

T. V. Muthukrishna Aiyar for appellant.

C. V. Anantakrishna Aiyar, R. Subrahmania Aiyar, N. Rajagopalachariar and *T. R. Venkatarama Sastri*, for respondents.

C. V. Anantakrishna Aiyar—took a preliminary objection that no appeal lay as the Sub-Judge simply recommended a person to the District Judge for receivership and the District Judge declined to appoint a receiver and the petition was then dismissed. The District Judge's order is under S. 505, C. P. C., and not under S. 503—*Venkatasami* v. *Strideviamma*[1] *Bai Mani* v. *Kimchand Gokaldas*[2]

T. V. Muthukrishna Aiyar.—This is virtually an order by the Sub-Judge refusing to appoint a receiver. The order of the District Judge also is really made under S. 503, C.P.C.-*Khagendra Narain Singh* v. *Shashadhar Jha.*[3] S. 505 simply describes the method in which the District Judge is to act.

The Court delivered the following

JUDGMENT:—We must follow the decision printed in a foot note to *Venkatasawmi* v. *Sri Deviamma*[1] and hold that no appeal lies against the District Judge's order under S. 505 of the Code of 1882.

The appeal is dismissed with costs.

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* A. A. O. No. 193 of 1908. 16th April 1909.

1. (1886) I.L.R. 10 M. 179, 180 (F.B,) 2. (1908) I.L.R. 33 B. 104.

3. (1904) I.L.R. 31 C. 495.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Devi Bhagavalu .. Appellant *
v. (*Plaintiff*)
Tadpatri Veeravadhanta and others .. Respondents.
(*Defendants*)

Bhagavalu v. Veeravadhanta.

Co-tenancy—Provisional partition—Deed—Construction—Covenant to make another partition at the end of term—Sale of undefined share by one of the sharers—Rights of vendee—Necessary party to suit—Suit for partition by vendors—Limitation Act, S. 22.

Three brothers partitioned their properties provisionally by means of an award which provided *inter alia* that until a certain year "Sarvajit" each should enjoy the lands allotted to his share according to the division then made, and that at the end of the term all profits and losses should be made equal and the said lands divided equally. One of the parties sold half a visam of his share to the plaintiff and allowed another portion to be sold for arrears of rent. In a suit by the vendee of the undefined share :

Held, on a construction of the award—(1) That the joint tenancy or tenancy-in-common which existed before the award was not finally put an end to but continued to remain till the end of Sarvajit though subject to separate enjoyment of special allotments till then.

(2) That the conveyance by one of the sharers was a valid transfer of all the sharer's interest conveyed and that the plaintiff was entitled to maintain a suit for partition of the whole land within 12 years from Sarvajit.

(3) That even assuming that the vendor-sharer was responsible for the rent sale of a portion of the property in the sense that he could have avoided the rent sale by payment of rent, the property sold must be held to have been impressed with the liability to re-partition at the end of Sarvajit and that the right to re-partition of the vendor-sharer or his vendee was not consequently lost.

(4) That the purchaser in rent sale was a necessary party to the suit for partition by the vendee.

(5) That the purchaser in the rent sale having been made a party to the suit after the expiry of 12 years from Sarvajit, the suit was liable to be dismissed against all the defendants, it being impossible to give any relief to plaintiff against others without joining the purchaser in the rent sale.

Second Appeal from the decree of the District Court of Vizagapatam in A. S. No. 73 of 1904 presented against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 139 of 1900.

The facts of the case appear sufficiently in the Judgment.

H. Sitaramaswami for appellant.

A. Krishnaswami Aiyar for *V. Ramesam* for respondent.

H. Sitaramaswami—submitted that the parties continued to be co-tenants even after the award and that the plaintiff as

* S. A. 1353 of 1905. 27th October 1909.

Bhagavalu v. Veera-vadhanta.

purchaser from one of them was entitled to maintain a suit for repartition on the strength of the provision contained in the award. Even otherwise the plaintiff was entitled to the benefit of the agreement as the provision was in the nature of a covenant running with the land—FREEMAN on *Co-tenancy*, p. 279; *Aiyyagiri Venkataramayya* v. *Aiyyagiri Ramayya.*[1]

A. Krishnaswami Aiyar.—A family partition was referred to arbitrators and the award of the arbitrators provided that at the end of a particular year the properties shall be re-divided and profits and losses taken into account. Plaintiff sued to enforce this provision as the purchaser of ½ visam of land from one of the parties to the original partition. The question is whether the plaintiff is entitled to maintain this suit. It is submitted that the plaintiff could maintain the suit (1) only if the parties could be regarded as continuing to be co-tenants even after the award; (2) if not, plaintiff could maintain the suit only if the provision in the award could be regarded as a covenant running with the land.

(1) On the 1st point, the parties are no longer co-tenants as there was a definition of shares under the award and as they were in enjoyment of distinct plots of land. Even if they continued to be co-tenants, a purchaser of a specific plot of land from one of the co-tenants could not maintain a suit for a general partition. And lastly, the suit fails as one of the persons interested in the properties was not made a party until after the limitation period expired.

(2) If they are not co-tenants, plaintiff could maintain a suit only if the provision be regarded as a covenant running with the land. The fact that the provision is contained in an award is immaterial. An award has to be construed by a Court just like a contract. In fact, the Court of Chancery treated an award as a contract, the terms of which were ascertained by a third party. A direction for re-partition is like a provision for exchange or for sale, and it has been held that a provision in a lease empowering the lessee to demand a sale of the reversion has been held not to be a covenant running with the land—*Woodall* v. *Clifton.*[2] Though the case deals with leases, the principle is equally

1. (1902) I. L. R. 25 M. 690.   2. (1905) 2 Ch. 257.

applicable to provisions contained in sale-deeds or conveyances. For the definition of a covenant running with the land see *Dewar* v. *Goodman*[1]. As to what is a covenant running with the land *Austerberry* v. *Corporation of Oldham*[2] was also referred to. Next, even assuming a purchaser of the entire interest of one of the parties to the original partition is entitled to the benefit of the direction contained in an award, a purchaser of a portion cannot maintain the suit—*Durham Brothers* v. *Robertson*[3]. Lastly, plaintiff, in any event, is not entitled to maintain the suit as his vendor put it out of his power to bring all the properties into the hotch-pot by allowing one of the properties in his hands to pass into the hands of a stranger at a rent-sale.

The Court delivered the following

JUDGMENT :—Defendants Nos. 1, 2 and 3 owned amongst themselves four vriths, 13 visam and one pie of land in the agraharam of Sangalsa. In 1876 there was an award of arbitrators on a submission made by them dividing the common properties. That document is Exhibit *H*. The plaintiff purchased half a visam of land from the 1st defendant on 28th March 1897 out of the lands that had fallen to the 1st defendant in the division made by the award. The District Munsif gave the plaintiff a decree for his half visam by directing a division of the entire property of the three brothers.

The District Judge has dismissed the suit. The first question to be decided is whether the plaintiff was entitled to the division, and this turns on the right understanding of the provision contained in Exhibit *H*. Exhibit *H* says : " Time is fixed for the partition of the said paddy fields up to the end of the year Sarvajit (1887-1888). So it is settled that each should enjoy the lands allotted for his share until then, and that, at the end of the said term, they should again divide the said lands so that the profits and losses are equal and then enjoy" * *

" Time is fixed for the partition of the said palmyra topes and mango tope lands up to the end of the year Sarvajit (1887-1888). So it is settled that, until then each should enjoy the lands allotted to his share according to the above arrangement,

1. (1905) 2 Ch. 257.
2. (1885) 29 Ch. D. 750.
3. (1898) 1 Q. B. 765.

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and that, at the end of the said term the profits and losses should be made equal and the said lands divided by the parties equally" * * *

What is the effect of the foregoing clauses ? The arbitrators do not make a final division of the properties. They direct enjoyment separately of the plots specifically assigned to each of the sharers and instead of making a final partition direct a future division to be made in the year Sarvajit. It is clear that, subject to the separate enjoyment of the shares allotted to each, the parties are entitled jointly or as tenants-in-common to all the properties temporarily divided until the division to be made after Sarvajit. Every part of the property comprised in this allotment is subject to the common ownership to be finally terminated by partition after Sarvajit. The plaintiff, as the purchaser of an undefined half visam, or of definite plots amounting in extent to a half visam, must be entitled to claim a partition after Sarvajit as the second and third defendants would, notwithstanding the alienation of a portion of the lands by the 1st defendant, be entitled to claim a partition against the 1st defendant. It is impossible to construe Exhibit *A* as a contract entered into by defendants Nos. 1 to 3—see *Krishna Panda* v. *Balaram Panda* [1], *Soornavalli Ammal* v. *Muthayya Sastrigal* [2], and *Bajahhari Saha Barrikya* v. *Behari Lal Basak.*[3] Their joint-tenancy or tenancy-in-common which existed before the award Exhibit *H* is not finally put an end to, but continues to remain till the end of Sarvajit though subject to separate enjoyment of special allotments till then. No objection was taken in the written statements of the contesting defendants, and no issue was framed as to whether the plaintiff as a mere purchaser of a portion of the property allotted to the 1st defendant under the award was entitled to claim a partition under the terms of the award. And the District Judge, in paragraph 8 of his judgment, distinctly concedes that " as a purchaser from the 1st defendant the respondent (plaintiff) stands in his shoes and if the 1st defendant can now claim re-partition from his brothers respondent can claim a re-division." We may usefully add the remarks of FREEMAN in his book on *Co-Tenancy* at p. 279 in support of

1. (1896) I.L.R. 19 M. 290. 2. (1900) I.L.R. 23 M. 593.
3. (1906) I.L.R 33 C. 881

the District Judge: " If, however, there remain any States wherein the Courts really intend to assert that a conveyance by one co-tenant of part of the common property is void, in any other sense than that such conveyance will not operate against or diminish or impair the rights of the non-assenting co-tenants. Such courts are falling into minority, as the more recent decisions tend strongly towards the recognition of such conveyance as a valid transfer of all the grantor's interest in the property therein described, entitling the grantor to certain rights that the co-tenants of the grantor cannot wantonly disregard"—S. 204. The District Judge, however, comes to the conclusion that the 1st defendant must be deemed to have elected to forego the privilege he possessed of claiming a fresh division at the end of the Sarvajit by his failure to preserve his share intact. Some portion of these lands which had fallen to the 1st defendant was sold for arrears of Kattubadi under a decree obtained by the Zemindar against defendants Nos. 1 to 3 and other sharers. Assuming for the sake of argument that the 1st defendant was responsible for the sale of a portion of his property because he could have avoided it by payment, the property sold must be held to have been impressed with the liability to re-partition at the end of Sarvajit in the same manner that the half visam purchased by the plaintiff in private sale was itself liable to re-partition if the 2nd and 3rd defendants chose to insist upon it.

It cannot be therefore said that the 1st defendant lost his right to re-partition by the sale of a portion for arrears of rent. The District Judge himself points out that if the property, when sold, had been the joint property of the three brothers, they could have no complaint that it was not kept available for re-partition. All that can be said is that the properties divided by the award in Sangavalsa being liable to re-partition the plaintiff is not entitled, any more than the 1st defendant was, to claim a re-partition of a portion of the properties divided omitting those that were sold for arrears of rent and have come into the hands of the 1st defendant's wife (the 4th defendant) as transferee of the purchaser in auction. We may refer, by way of analogy, to suits by purchasers from one of several co-parceners in a Hindu family of his share in a portion of the family property where the whole family property is required to be partitioned for the purpose of

Bhagavalu v. Veeravadhanta.

assigning the plaintiffs their share. See MAYNE'S *Hindu Law*, S. 494. We must, therefore, hold that the plaintiff was entitled to maintain the suit for the recovery of his half visam by a re-partition.

It remains, however, to consider whether in the above view the suit was rightly conceived without the 4th defendant having been impleaded as a party in the first instance. The remarks already made are sufficient to show that no re-partition could be made without the lands in the possession of the 4th defen- being brought into hotch-pot. At the time the 4th defendant was added as a party more than 12 years had elapsed from the end of Sarvajit and the suit would, as against her, be barred by limitation. And as she was a necessary party the whole suit was liable to be dismissed. See *Imam-ud-din* v. *Liladhar* [1]; *Kalidas Karial Das* v. *Nathu Bhagvan.*[2] If relief could be given to the plaintiff against defendants Nos. 1 to 3 without joining the 4th defendant and including the lands bought by her, the claim must be dismissed as against her merely—*Ramkinkar Biswas* v. *Atikulchundra Chaudhri.*[3] That being impossible the whole suit fails. We would, on this ground, support the decree of the District Judge and dimisss the second appeal, but without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—MR. Justice Munro and Mr. Justice Abdur Rahim.

Padmanabha Panji Kannaya .. Appellant* (1*st Prisoner*).

v.

King-Emperor

Cr. P. C., S. 423.—"Alter a finding"—Powers of appellate Court to reverse a conviction for an offence and find the accused guilty of abetment of the offence.

It is not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself, S. 423 has to be read with Ss. 237 and 238, Cr. P. C. [*Regina* v. *Chund Buran Philbai Adamji*[4] followed.] The appellate Court, while reversing a conviction for an offence, is not competent to convict the accused of abetment thereof.

Appeal from the sentence of the Court of Session of the South Canara Division in case No. 14 of the Calendar for 1909.

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* Cr. A. No. 523 of 1909. 28th October 1909.

1. (1892) I.L.R. 14 A. 524.
2. (1883) I.L.R. 7 B. 217.
3. (1907) I.L.R. 35 C. 519.
4. (1874) 11 Bom. H.C.R. 240.

S. Swaminathan and *B. Sitharama Rao*, for appellant, submitted that there was no evidence of forgery having been committed by the appellant or his having been present at the time forgery was committed, or his having abetted the same, and therefore, under the circumstances, the appellant could not be convicted of forgery.

The Public Prosecutor (*C. F. Napier*) contended that there was evidence of forgery, or at least that the appellant should be convicted of abetment and cited *Kashi Nath Nack* v. *Queen Empress*[1].

S. Swaminathan in reply contended that the conviction could not be altered in appeal into one under S. 109, and also that there was no evidence of abetment. He cited *Regina* v. *Chund Burand Phirbhai Adamji.*[2]

The Court delivered the following

JUDGMENT:—In this case the appellant and another were charged with offences under Ss. 467 and 468 of the Indian Penal Code. The appellant was convicted under these sections. Such evidence as there is, however, shews that the alteration of the document was made, not by the appellant, but by the man who was charged along with him. The conviction of the appellant under Ss. 467 and 468 of the I. P. C. was therefore wrong. We are asked, however, to consider the propriety of convicting the appellant for abetment of these offences. We have not been referred to any authority in support of the proposition that when a person has been charged with a certain offence and has been convicted of that offence the appellate Court can, on finding that the conviction is not sustainable, convict the accused of abetment of that offence. No doubt, under S. 423 of the Criminal Procedure Code, the appellate Court has power to alter a finding, but we take it that that power cannot be used arbitrarily but only in accordance with other provisions of the Code. Those provisions are to be found in Ss. 237 and 238 of the Criminal Procedure Code, and neither of these covers a case like the present. The ruling in *Regina* v. *Chund Burand Phirbhai Adamji*[2] is clear authority for holding that it is not open to a Court to find a man guilty of the abetment of an offence on a

1. (1897) I. L. R. 25 C. 207.
2. (1874) 11 Bom. H. C. R. 240.

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charge of the offence itself, and we agree with the reasoning on which the ruling is based. We set aside the conviction and acquit the accused of offences under S.467 and 468 of the Indian Penal Code. His bail bond is discharged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Mari Veetil Chattu Nair and others .. Appellants*
(*Defendants* 2 *to* 14.)

v.

Mari Veetil Mulamparol and others .. Respondents
(*Plaintiffs*).

Chattu Nair v. Mulamparol.

Malabar Law—Tarwad—Property acquired by Anandravan while a Manager of a branch and when in possession of the funds of the branch without anything of his own—Tawazhi—Tarwad—Constitution of.

The property acquired by the Manager of a branch who is only an Anandravan of the whole tarwad belongs to the branch if he was at the time of the acquisition in possession of the funds of the branch without anything of his own.

Where a female and some or all of her children obtain property from her father and have been in possession for 80 years and the members of the branch have constituted a separate branch and lived separately, a finding based on the fact that the members constituted a separate Tawazhi Tarwad is not bad in law.

Second Appeal from the decree of the District Court of North Malabar in A. S. No. 209 of 1906 presented against the decree of the Court of the District Munsiff of Quilandy in O. S. No. 594 of 1904.

This was a suit for a declaration that the plaintiffs are entitled to the sum of Rs. 449-9-2 in deposit under this Court's decree in O. S.No. 229 of 1903. The properties referred to in the plaint were being held on a kanom of Rs. 800 granted to the Karnavan of the plaintiffs and defendants who are members of the same Tarwad. In 1903 the jenmi instituted O. S. No. 229 to redeem the kanom. Redemption was ordered but disputes having arisen between plaintiffs and defendants as to who were entitled to this kanom amount and value of improvements remaining due after the arrears of rent and costs were set off namely Rs. 449-9-2, the decree directed that the amount should be deposited in Court and that within 6 months from the date of deposit plaintiffs should

* S.A. No. 1034 of 1907. 9th November 1909.

establish their title to it by a separate suit. Hence this suit by them.

Chattu Nair v. Malamparol

T. R. Ramachandra Aiyar and *T. R. Krishnasamy Aiyar*, for appellant, relied on *Korott Amman Kutti* v. *Perunjottil Appu Nambiyar*[1] and A. S. 59 of 1905 for the position that the donees are not constituted into a Tarwad to whom the presumptions applicable to the karnavan of a Tarwad would apply.

J. L. Rosario and *K. M. Krishna Kurup*, for respondent, relied on *Veerarayan* v. *Valia Rani of Pudia Kovilagam*[2].

The Court delivered the following

JUDGMENT:—It is found by the Courts below that the plaintiffs constituted the members of the Tavazhi tarwad of Mulamparol and that they are entitled to the kanom amount in deposit. It is contended for the defendants that this finding is not correct. The decision in *Korott Amman Kutti* v. *Perunjottil Appu Nambiyar*[2] is cited as opposed to the view of the lower Courts. It was there held by *Moore* and *Sankaran Nair* JJ., "that when a female and some of, or all, her children obtain any property from their father or Karnavan they are not thereby constituted into a tarwad by themselves, the senior member among them having the ordinary rights of the Karnavan of a Malabar Tarwad so far as the other members in his branch are concerned." This view has been adopted in A. S. No. 59 of 1905. All that these cases can be said to decide is that the mere circumstance of such a gift without more is insufficient to create a Tavazhi Tarwad. But whereas in this case there is the gift of property in enjoyment by the Tavazhi for more than eighty years and separate living by the members of the branch, we are not prepared to say that the Courts below were not justified in coming to the conclusion that the branch constituted a Tavazhi Tarwad. But, whether this view is correct or not, the question is whether the property acquired by the Manager of the branch, who is only an Anandravan of the whole Tarwad, when there is no evidence as to the source out of which the property was acquired, is to be deemed the property of the Tarwad or of the branch. It is admitted that Ukkaran Nair who was the Manager of the branch and an Anandravan of the Tarwad

1. (1906) I. L. R. 29 M. 322.
2. (1881) I. L. R. 3 M. 141.

Chattu Nair v. Malamparol.

at the time acquired the kanom interest under Exhibits A and B. It is a well recognized principle of Hindu Law that if nothing appears upon the case except that a member of a joint family is in possession of property and he alleges that it is his own self-acquisition he is alleging an exception to the general rule and it lies upon him to prove the exception." See MAYNE, paragraph 289. This rule is applicable to acquisitions by Anandravans in Malabar families and has been so applied. In *Veera Rayen* v. *Valia Rani of Pudia Kovilagam, Calicut*[1] it was stated "it lay on the 1st appellant who being a member of the Kovilagam is found in possession of property, to prove a separate title to it." See also S. A. 970 of 1883 and S. A. 1153 of 1888. There is no evidence worth the name that Ukkaran Nair had separate property of his own from which the kanom could have been acquired.

It remains then to consider whether the acquisition by Ukkaran Nair was for the plaintiff's branch and out of its funds or for the Tarwad. Self-acquisition being out of the way, we think the Courts below were justified in finding that the property belonged to the branch of which Ukkaran Nair was Manager and whose funds he handled.

It is unnecessary to lay it down as a broad proposition of law that every acquisition by the Manager of the branch, even though it has not become a Tavazhi Tarwad, is to be presumed to be the property of the branch. The fact that Ukkaran Nair was only an Anandravan of the Tarwad and was at the time of the acquisition in possession of the funds of the branch, but none of his own, is sufficient to justify the finding of the Courts below that it was made out of the funds of the plaintiff's branch.

The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Bhimarazu Varadayya .. .. Appellant*
(*1st Defendant*)

v.

Manchukonda Nammalwar and others .. Respondent.

Varadayya v. Nammalwar.

Madras Acts—Act XXIII of 1871—Attachment and sale of unenfranchised inam of land revenue or grant of money.

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* A. A. A. O. No. 86 of 1908. 25th August 1909.

1. (1881) I. L. R. 3 M. 141 at p. 145

An unenfranchised inam can be attached and sold in execution of decree of a Civil Court.

Varadayya v. Nammalwar

Appeal from the order of the District Court of Guntur in A. S. No. 185 of 1908 presented against the order of the Court of the District Munsif of Ongole in E. P. No. 361 of 1908 in O. S. No. 432 of 1907.

T. Prakasam for appellant.

T. V. Seshaghiri Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The question is whether an unenfranchised inam can be attached and sold in execution of a decree of a Civil Court. We think it can. The question must be settled by reference to Act XXIII of 1871 which consolidates the law relating to pensions and grants by Government of money or land revenue. Now while S. 4 of the Act prevents a Civil Court from entertaining a suit relating to a pension or grant of money or land revenue it has been thought necessary in S. 11 to state that certain pensions are not liable to attachment by the Civil Courts. The omission of grants of money or land revenue is significant and shews clearly that under Act XXIII of 1871 such grants are not exempt from attachment.

This appeal is dismissed wich costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim. = 6 M.L.T.

Ramaiengar, and Vedantachari minor,
by next friend A. Rangasawmi Iyengar .. Appellants*
(*2nd Plaintiff*)

v.

16 C.W.N. 519

The Secretary of State for India in Council represented by the Collector of Chingleput .. .. Respondent.
(*Defendant in both appeals.*)

Hindu Law — Debts — Father's debts — Son's liability—Immoral debts—Fines —Father's liability to pay costs due to Government in a false pauper suit.

Ramiengar v. Secretary of State.

A Hindu father brought a suit in *forma pauperis* as next friend of one of his sons (the appellants) to establish his adoption; and the suit was dismissed on the ground that the adoption set up was false with a direction that the father should pay the costs to Government.

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* S A. Nos. 563 and 564 of 1906. 22nd September 1909.

Ramaiengar v. Secretary of State.

Held:—That the liability to pay the costs was imposed as a penalty for the father's misconduct in bringing a false case and the debt so incurred was tainted with immorality and that the sons were not bound to pay the same.

Second Appeals from the decrees of the District Court of Chingleput in A. S. Nos. 98 and 99 of 1905, respectively, presented against the decree of the Court of the District Munsif of Chingleput in O. S. No. 537 of 1904.

T. Narasimha Aiyangar for appellant :—The order to pay costs is in the nature of a fine for having brought an improper action—*Devkabai* v. *Jefferson*[1]; *Komul Chunder Sen* v. *Surbessur Doss Goopto*[2]. In this case, there was a clear finding in the previous judgment that the claim was a false one, necessarily to the knowledge of the father. No adoption could have taken place without his knowledge and concurrence. The following cases were cited:—*McDowell* v. *Ragava Chetty*[3]; *Durbar Khachar* v. *Khachar Harsar*[4]; *Periyasami Mudaliar* v. *Seetharama Chettiar*[5]; *Natesayyar* v. *Ponnusami*[6].

The Government Pleader contended that the analogy was rather to be found in cases of surety debts for which the son is liable and also relied upon *Chettikulam Venkitachala Reddiar* v. *Chettikulam Kumara Venkatachala Reddiar*[7] and MAYNE'S *Hindu Law and Usage*, 7th Ed., p. 303.

The Court delivered the following

JUDGMENT :—The father of the appellant in these two appeals brought a suit *in forma pauperis* as next friend of one of the appellants to establish his adoption and recover possession of property. The alleged adoption was found to be false, the suit was dismissed, and the father of the appellants was directed, under S. 440, Civil Procedure Code to pay the costs due to Government. Now the reason why the appellants' father was made liable for these costs was that he had been guilty of what was certainly an immoral act in bringing a suit which he must have known to be false. The liability to pay the costs was clearly imposed as a penalty for his misconduct and the debt thus incurred is tainted with immorality and the sons are not bound to pay. Again under Hindu Law, among debts which sons are

1. (1886) I.L.R. 10 B. 248.
2. (1874) 21 W. R. 298.
3. (1903) I.L.R. 27 M. 71.
4. (1908) I.L.R. 32 B. 348.
5. (1903) I.L.R. 27 M. 243 (F. B.)
6. (1892) I.L.R. 16 M. 99.
7. (1905) I.L.R. 28 M. 377.

not bound to pay are fines (see MAYNE'S *Hindu Law*, 7th edition, page 389) and in this case the liability imposed upon the appellant's father may also be regarded as in the nature of a fine. We, therefore, allow these appeals and give the plaintiffs a decree as prayed for, with costs throughout.

Ramaiengar v. Secretary of State.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Muvvula Seetharam Naidu .. Appellant* (*Plaintiff*)
v.
Doddi Ramu Naidu .. Respondent (*Defendant*).

Madras Act III of 1895—Hereditary Village Officers Act, Ss. 21, 13—Jurisdiction of Civil Courts—Suit to recover service inam land from lessee holding over.

Seetharam Naidu v. Ramu Naidu.

A suit for the recovery a village officer's inam land from the defendant on the expiry of a lease granted by the plaintiff is cognizable by a Civil Court.

It is a general principle of law that every presumption shall be made in favor of the jurisdiction of a civil court and that it shall not be taken away except by express words or by necessary implication.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in A. S. No. 278 of 1905 presented against the decree of the District Munsif's Court of Parvatipore in O. S. No. 331 of 1905.

Suit to recover certain lands, the plaintiff alleging that he leased them to defendant for a year and that the defendant held over. The defendant denied the lease.

It appeared that the lands were emoluments attached to the office of Village Munsif. Both the lower Courts dismissed the suit on the ground that the suit was not maintainable under S. 21 of Madras Act III of 1895. The plaintiff appealed.

V. Ramesam for appellant.

P. Narayana Murthi for respondent.

V. Ramesam:—The suit is maintainable in the Civil Court. S. 21 has to be read with S. 13. The suit cannot be filed in a

*S. A. 551 of 1909. 22nd October 1909.

Seetharam Naidu v. Ramu Naidu.

Revenue Court under S. 13 as it is not based on the grounds mentioned in that section. [*Krishnaswami Aiyar* J.—Is not the Full Bench case in *Kasiram Narasimhulu* v. *Narasimhulu Patnaidu*[1] against you?] No. On the other hand, the observations in that case are in my favour—*Miller* J. at p. 131; the *Chief Justice* at p. 129. It was conceded in argument by the vakil for the appellant. (*Vide* 16 M. L. J. at p. 515). This is the very case contemplated by *Subrahmanya Aiyar* J. in 16 M. L. J. at p. 336, and though his decision was reversed by the Full Bench this observation is not affected. A suit under S. 9 of the Specific Relief Act (one of the cases mentioned by Mr. Krishnaswami Aiyar in argument in 16 M. L. J., p. 334) has been held to lie in the Civil Courts—*Boddam* J. in C. R. P. 3 of 1903 (unreported).

P. Narayana Murthi:—The decision of *Subrahmanya Aiyar* J. was reversed by the Full Bench and his observation has no force. Madras Act III of 1895 consolidates and re-enacts Regulation VI of 1831, under Ss. 3 and 4 of which the present suit would not lie in the Civil Courts.

V. Ramesam in reply:—Though S. 4 of Regulation VI of 1831 is similar to S. 21 of Act III of 1895, S. 3 was wider than S. 13, and the argument based on the old law fails.

The Court delivered the following

JUDGMENT.—The question is whether a suit for a village officer's inam land, on the expiry of a lease to the defendant granted by the plaintiff, is cognizable by a Civil Court. The Courts below have decided against the plaintiff. The Subordinate Judge relies on the decision in *Kasiram Narasimhulu* v. *Narasimhulu Patnaidu*[1]. Far from supporting his view, the observations, in that case, of *Miller* J., at page 131, are in favour of the plaintiff, and the other learned Judges do not dissent from his remarks. Indeed it may be said that the *ratio decidendi* of that case supports the appellant's arguments. Both the learned *Chief Justice* and Justice *Miller* say that Sections 13 and 21 of Act III of 1895 should be read together. Section 13 confers jurisdiction on the Revenue Courts and defines the class of cases of which a Revenue Court may take cognizance. Section 21 specifies the class of suits of which the Civil Court shall not take cognizance. It

1. (1906) I. L. R. 30 M. 126.

Seetharam Naidu v. Ramu Naidu.

is reasonable to hold, notwithstanding the apparent generality of the language of S. 21, that the jurisdiction of the Civil Court is taken away in those cases in which it is conferred on the Revenue Court by S. 13. Moreover, it is a general principle of law that every presumption shall be made in favour of the jurisdiction of a Civil Court, and that it shall not be taken away except by express words or by necessary implication. We are, therefore, inclined to hold that the Civil Court has jurisdiction in this case. The express words of S. 13 make it impossible to bring such a suit as the present within them. The case put by Mr. Justice *Subrahmanya Aiyar* in *Narasimhulu* v. *Narasimhulu*[1] is, we think, right. He says: "Suppose an office-holder in possession of an inam land, which is admittedly inam land, lets it out to a tenant for cultivation for a year, and that the tenant at the expiry of the term refuses to quit. According to the general law the landlord can eject the tenant without showing more than the letting and the expiry of the term, as he is not called upon to allege or prove his right to the land or to the office, the tenant being estopped in such a case from raising any question as to the title of the party, etc."

Mr. Justice *Boddam* has taken the same view in Civil Revision Petition No. 3 of 1903.

The decision in *Basappa* v. *Venkatappa*[2] was under Regulation VI of 1831, and the language of S. 4 of that regulation which corresponds to S. 13 of Act III of 1895 is very different.

We must reverse the decrees of the Courts below and remand the suit to the District Munsif for disposal according to law. The plaintiff will not be entitled to base his suit on his title to the Inam.

The costs in this and the lower appellate Court will be provided for in the decree.

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1. (1906) I.L.R. 30 M. 126. 2. (1868) 4 M. H. C. R. 70.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Gavara Ramanna .. Appellant *
v. (*Plaintiff*)
Adabala Rattayya .. Respondent
(*Defendant*).

Ramanna v. Rattayya.

Madras Act III of 1895—Hereditary Village Officers Act, S. 13, proviso II, and S. 21—Suit to recover land on the basis that it does not form part of the inam—Jurisdiction of Civil Court.

A suit for recovery of land not based on the ground that the land constitutes part of the emolument of the office is cognizable by a civil court.

A claim to recover lands by itself does not raise a question as to the rate or amount of the emoluments of the office.

Obiter.—The question whether the emoluments of the office consisted of land or of an assignment of revenue is "one of the facts in issue" within the meaning of the proviso II to S. 13. The effect of the words "but such decision, etc" is to preserve the jurisdiction of the civil courts even in cases where the Collector decided the claim on the assumption mentioned in the section and not to oust the jurisdiction in cases where he did not. S. 13 is an enabling section conferring jurisdiction on Revenue courts and by itself cannot oust the jurisdiction which would otherwise exist.

Second appeal from the decree of the Subordinate Judge's Court of Ellore in A. S. No. 232 of 1905 presented against the decree of the Court of the District Munsif of Tanuku in O. S. No. 431 of 1904.

Suit for the recovery of lands in the possession of the defendant on the allegation that the defendant was put in possession in execution of a decree of the Collector of Godavari who held, reversing the judgment of the Head Assistant Collector, that the plaint land was the emolument of the office of Naikwadi belonging to the defendant. One of the contentions of the present plaintiff in that suit was that the land revenue alone formed the emolument. But as there was no issue on the point, the Collector gave the defendant possession of the land. Both the Courts below dismissed the suit on the ground that Ss. 13 and 21 of Act III of 1895 barred the suit. Hence the appeal.

P. Narayana Murthi for appellant.

P. C. Lobo for respondent.

P. Narayana Murthi :—"Fact in issue" is not the same as "issue of fact," *vide* S. 3, Evidence Act. The point was

* S. A. 1412 of 1907. 29th November 1909.

specifically raised, and the point was also pressed before the Collector. Under those circumstances the Collector was bound to decide under proviso (ii) of S. 13 on the assumption that only the land revenue constitutes the emoluments. His decree, so far as it goes beyond the emoluments is *ultra vires*, and cannot affect the plaintiff.

Again, the jurisdiction of Civil Courts, except so far as it is ousted by S. 21 still remains. This is not a claim to any village office, nor does any question as to the rate or amount of the emoluments arise in this case.

P. C. Lobo—contended that *Kasiram Narasimhulu* v. *Narasimhulu Patnaidu*[1] applied and the jurisdiction of the Civil Courts is ousted in such cases by S. 21 of the Act. Whatever difference there is between fact in issue and issue of fact, whether land or revenue was the emolument was not a fact in issue since the attention of the 1st Court at any rate was not directed to that point. The case does come within S. 21. It does involve the determining of the rate and amount—whether the larger compensation be land revenue or the smaller one of revenue alone is the emolument. Again, the plaintiff claims for the whole of the emolument, not admitting that the defendant is entitled to the revenue. That makes the suit one for the emoluments of the office.

P. Narayana Murthi replied.

The Court delivered the following

JUDGMENT :—Except in the cases in which the jurisdiction of the Civil Courts is taken away by Act III 1895 that jurisdiction remains.

The section of the Act of 1895 which bars the jurisdiction of the Civil Courts is S. 21. The present suit does not fall within that section. It is not a claim to succeed to any of the offices mentioned in S. 13. It does not raise a question as to the rate or amount of the emoluments of any such office. If it did, every claim to recover lands would be outside the jurisdiction of the Civil Courts, which is opposed to the words "but such decision shall not bar the right of the claimant to institute a suit in a Civil Court for recovery of the land itself"—the last sentence in

1. (1906) I. L. R. 30 M. 126.

Ramanna v. Rattayya.

proviso (ii) to S. 13 (1) of the Act. A claim to recover lands, in our judgment, does not raise a question as to the rate or amount of the emoluments of the office. Section 21 itself contains an express provision as to any claim to recover the emoluments of the office, which may include land. The words "any claim to recover the emoluments of any such office" in S. 21 do not apply to the present suit, since the suit is not a suit for land based on the ground that the land constitutes part of the emoluments of the office. The general provision in the Act which bars the jurisdiction of the Civil Courts does not, in our view, apply to the present suit.

In this view it is unnecessary to consider whether proviso (ii) to S. 13 (1) applies.

In the view that proviso (ii) applies, we think that the question whether the emoluments of the office consisted of land or of an assignment of revenue was "one of the facts in issue" within the meaning of the proviso, and the Collector was therefore bound to decide the claim on the assumption that only the assignment constituted the emoluments. The Collector not having done so, the right of suit to establish the claim to the land remains unaffected. The effect of the words "but such decision, etc." is to preserve the jurisdiction of the Civil Courts even in cases where the Collector decided the claim on the assumption and not to oust the jurisdiction in cases where he did not. Section 13 is an enabling section conferring jurisdiction on Revenue Courts and, by itself, cannot oust jurisdiction which would otherwise exist. This view is not inconsistent with the decision of the Full Bench in *Kasiram Narasimhulu* v. *Narasimhulu Patnaidu.*[1]

As in our opinion S. 21 does not bar the suit, we must set aside the decrees of the Courts below and send the case back to the Court of First Instance to be disposed of according to law. We desire to point out that this decision does not entitle the plaintiff to reopen the question as to the assignment of revenue forming part of the emoluments of the office. The decree of the Collector must be regarded as binding to that extent.

Costs will abide the event.

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1. (1906) I.L.R. 30 M. 126.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Nanammai .. Appellant*
(*Counter-Petitioner*)

v.

The Collector of Trichinopoly .. Respondent
(*Petitioner*).

Nanammal v. The Collector of Trichinopoly.

C.P.C. (Act XIV of 1882) Ss. 266 (l), 273—Decree for maintenance, a right to future maintenance and not liable to attachment.

A decree for maintenance is a right to future maintenance and under S. 266 (l) C.P.C. (Act XIV of 1882) cannot be attached, nor can it be treated as a money decree capable of attachment under S. 273 C.P.C.

Appeal from the order of the Subordinate Judge's Court of Trichinopoly in E. A. No. 404 of 1908 in O. S. No. 7 of 1907.

In this case, in execution of an order for costs under S. 411, C.P.C., in favor of the Government, the Government attached the decree passed in the suit for maintenance by means of a prohibitory order under S. 273, C. P. C., Objection was taken that, having regard to S. 266, Cl. (*l*), C.P.C., the decree was not attachable in respect of arrears that had not already accrued due. The lower Court overruled the objection and directed the amount of future instalments to be paid into Court. Hence the appeal.

P. Sivagnana Mudaliar for appellant—contended that the decree could not be attached, having regard to S. 266, Cl. (*m*), and that *Monessur Doss* v. *Beer Protap Sahu* [1] taken with *Haridas* v. *Baroda Kishore*[2] made the point clear.

The Government Pleader for the respondent—contended that a decree does not come within the mischief of S. 266 ; right to future maintenance in the section contemplates only the indeterminate right to future maintenance ; that the Government had a charge on the maintenance order under S. 411 ; that this engrafts an exception on the general rule in S. 266, and that in any event the procedure adopted in *Monessur Doss* v. *Beer Pratap Sahu*[1] ought to be followed, which is in fact the procedure adopted by the lower Court ; vide *Randas* v. *Secretary of State.*[3]

* C. M. A. 234 of 1908. 6th August 1909.

1. (1871) 15 W. R. 188.
2. (1899) I. L. R. 27 C. 38.
3. (1896) I. L. R. 18 A. 419.

Nanammal v. The Collector of Trichinopoly.

The Court delivered the following

JUDGMENT :—The decree for maintenance is a right to future maintenance and under S. 266 (*l*) of the Civil Procedure Code of 1882 cannot be attached. It is not a money decree and cannot be attached under S. 273 of C. P. C. of 1882, as seems to have been done in this case. Perhaps the proper procedure would be that laid down in *Monessur Dass* v. *Beer Pratap Sahu*[1]. The appeal is allowed and the attachment set aside. There will be no costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Saminatha Vellala Thevan .. .. Appellant*

v.

Muthusawmi Vellala Thevan .. .. Respondent.

(*Petitioner-1st Plaintiff*).

Saminatha v. Muthusawmi

Court Fees Act, S. 11—"*Mesne profits*"—*Future mesne profits from plaint date, court fee on, not payable.*

S. 11 of the Court-Fees Act applies to a claim for mesne profits for which an amount can be, and has been, claimed by the plaint ; and consequently court fee is not payable on future mesne profits decreed from the date of plaint up till delivery. *Ramkrishna* v. *Bhimabai*[2] foll.

Appeal from the order of the District Court of Tanjore in A. S. No. 723 of 1907 presented against the order of the District Munsif of Tanjore in O. S. No. 360 of 1891 (E. P. No. 799 of 1906 : E. A. No. 682 of 1907).

Appeal from an order of the District Judge of Tanjore reversing an order of the District Munsif of Tanjore who dismissed an application for execution of a decree for mesne profits for non-payment of court-fee under S. 11 of Court-Fees Act. The suit was for redemption with mesne profits from the date of plaint (mortgage money being deposited in Court).

The decree directed delivery of the land to plaintiff and mesne profits from date of plaint till delivery, the amount to be determined in execution. The District Judge followed the ruling in *Ramakrishna* v. *Bhimabhai*[2] notwithstanding the expression of

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* C. M. A. 23 of 1908. 13th August 1909.

1. (1871) 15 W. R. 188.
2. (1890) I.L.R. 15 B. 416.

dissent contained in *Dwaraka* v. *Debendra*[1] and held that no court-fee was payable.

Saminatha v. Muthusawmi

M. Kunjunni Nayar for appellant.

T. R. Venkatrama Sastri for respondent.

M. Kunjunni Nayar—contended that court-fee was payable under S. 11, and cited *Dwaraka* v. *Debendra*[1] and *Maiden* v. *Janakiramayya*[2].

The respondent was not called upon.

The Court delivered the following

JUDGMENT:—We agree with *Ramakrishna Bhikaji* v. *Bhimabhai*[1] and dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

N. R. Authipurnam Pillai .. Appellant*

v.

N. Appasawmi Pillai .. Respondent.

Will—Construction—"Ekopithu"—Nature of estate taken.

A testator bequeathed the plaint propertie's to one *R* and *V* and his adopted son *K* to be enjoyed by them from generation to generation "ekopithu", *i.e.*, "harmoniously". There was also a gift in the same will of an absolute estate in certain other property to his adopted son *K*.

Authipurnan v. Appasawmi

Held:—On a construction of the will that the estate was to be enjoyed by the three devisees and their descendants without partition or alienation and that they were not to take as tenants-in-common.

Appeal from the judgment and decree of Mr. Justice Wallis in the Ordinary Original Civil Jurisdiction in C. S. No. 89 of 1906.

The facts of this case are given in the judgment.

V. Krishnaswami Aiyar for appellant.

The Advocate General (*P. S. Sivaswami Aiyar* for respondents.

V. Krishnaswami Aiyar:—"Santana paramparyamayi"—"munnivrar munnivru"—are words of inheritance and confer an absolute estate smilar to "Naslan-bad-naslan" or "Putrapoutradi krame"—cf. *Tagore case*[3]. "Ekopithu" and "without power of alienation" merely restrain alienation and are therefore bad;

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*O. S. A. 49 of 1907. 29th April 1909.

1. (1906) I.L.R. 33 C. 1233. 2. (1898) I.L.R. 21 M. 371.

3. (1872) 4. B. L. R. (O. C. J.) 182; on appeal 9 B. L. R. 395.

Authipurnam v. Appasawmi.

Tagore case[1]; *Bhoobun Mohin Debiya* v. *Hurrish Chunder Chowdry*[2] (where "to you and the generations of your womb for your support no other heirs of yours shall have any right or interest" were taken to confer an absolute estate); *Ramlal Mukherji* v. *Secretary of State for India* [3] (restraint on alienation in itself does not make the gift one for life); *Shookmoy Chandradas* v. *Hari Dassi* [4] (where only profits were given and thus the gift was taken to be one for life); *Lali Mohun* v. *Chuckun Lal*[5] and *Bhujanga Rao* v. *Ramayamma* [6] (where "purtrapoutra paramparivam" were held to be words of purchase); *Arumugum* v. *Ammi Ammal*[7] (where the words "from generation to generation" were construed to confer absolute estate); *Lala Ramjewan Lal* v. *Dal Koer*[8] (where the word "malik" was construed to confer an absolute estate); *Bhairo* v. *Parameshri Dayal*[9] (where the words "from generation to generation" were held to confer an absolute estate, notwithstanding the words "without power of transfer"); *cf.* S. 82, Succession Act. Absence of disposition over is also in favour of this construction—*Lala Ramjewan Lal* v. *Dal Koer*[8]; *cf.* S. 125, I. S. A. Joint tenancy is unknown to Hindu Law—*Jogeshwar Narain Deo* v. *Ramchund Dutt* [10]; *Muthumeenakshi* v. *Chandrashekhar* [11]; *Bai Dewali* v. *Patel Bechandas.*[12]

The Advocate General (*P. S. Sivaswami Aiyar*).—No doubt when the words of a gift are clear, restraint on alienation does not qualify the gift. The question here is: What exactly is the gift:—S. 82 of I. S. A. *Ram Jewan Lal* v. *Dal Koer* [8]; *Bhairo* v. *Parameshri Dayal*[9] do not bear on the question. Cf. *Rameshwer Prasad Sing* v. *Lachmi Prosad Singh*[13]. Referred also to *Shookmoy Chundradas* v. *Hari Dassi.*[4] Joint tenancy can be created by apt words.—*Jogeswar Narain Deo* v. *Ramchandra Dutt* [10].

V. Krishnaswami Aiyar in reply—cited *Ramamritham* v. *Ranganatham*[14] where it was held that the words "sons and grandsons" have the same effect in India as "heirs" in England.

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1. (1872) 4 B. L. R. O. C. J. 182; on appeal 9 B. L. R. 395.
2. (1878) 5. 1 A. 138.
3. (1881) 8. I.A. 61
4. (1885) 12 I. A. 103. S. C 11 C. 684.
5. (1897) 24 I. A. 76 S. C. 24 C. 824.
6. (1884) I. L. R. 7 M. 387.
7. (1863) 1 M. H. C. R. 400.
8. (1897) I. L. R. 24 C. 406.
9. (1884) I. L. R. 7 A. 516.
10. (1896) I. L. R. 23 I. A. 37.
11. (1902) I. L. R. 27 M. 498.
12. (1902) I. L. R. 26 B. 445.
13. (1903) I. L R. 31 C. 111.
14. (1900) I. L. R. 24 M. 299.

The Court delivered the following

JUDGMENT :—The question is whether the plaintiff's father took an absolute estate or an estate of inheritance under the terms of the Will—Exhibit A.

By that Will the testator bequeathed the two houses now in suit to his brothers-in-law Ramalinga Pillai and Veerasami Pilla and his adopted son Kandasawmi Pillai to be enjoyed by them ("Vamsa Paramparyamayi") from generation to generation (" egopithu") which means according to the plaintiff "harmoniously;" according to the defendants "living jointly", without any power of gift, mortgage or sale. There is also a gift in absolute estate of certain other property to his adopted son Kandasawmi Pillai.

The contention of the learned pleader for the appellant is that the testator has sufficiently shown his intention to create an estate inheritable according to law by the use of the words "Vamsa Paramparyamayi" and that the words restricting the power of transfer cannot be given effect to as being an attempt to take away the power of transfer which the law attaches to the estate already created.

It is true, as pointed by *Wallis* J., that if these words stood alone, they would shew an intention to create an estate of inheritance. But we have to find the intention of the testator, looking at the whole of the provisions of the will, and it appears to us that the learned Judge is right in holding that it was not the testator's intention to confer on any one of these donees an estate of inheritance with reference to one third share of the two houses. The subsequent clause by which he left certain other property absolutely to one of these three donees by apt words suggests a different intention on the part of the testator with reference to these two houses. The condition that the three donees and their descendants are to act harmoniously (" egopithu") shows that he intended that the properties should be kept intact without partition the provisions against alienation only confirming this view of the intention. A joint bequest to three donees, not members of a Joint Hindu family, with such provisions, seems inconsistent with any intention to grant any one of them an absolute estate in one-third share. It has also to be remembered that though words in terms giving a power of alienation are not indispensable to create

Authipurnam v. Appasawmi.

an absolute estate, they are often used. We are of opinion, therefore, that *Wallis* J is right in holding that the testator's intention to be gathered from the will was that the estate should be enjoyed by the three devisees and their descendants without partition or alienation, and that they were not to take as tenants-in-common. We accordingly dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Ralph S. Benson, Offg. Chief Justice, and Mr. Justice Abdur Rahim.

Krishna Reddi and others .. Petitioners *
v. (*Counter-Petitioners.*)
King-Emperor .. *Respondent.*

Krishna Reddi v. King-Emperor.

Cr. P. C., Ss. 428, 195—Appellate court's powers to direct further inquiry.

A District Magistrate has no power to order further inquiry by a subordinate Magistrate in regard to a matter dealt with by him under S. 195, Cr.P.C.

The power to take or call for further evidence, given by S. 428 Cr.P.C., is expressly limited to appeals under Ch. 31 of the Code and does not extend to proceedings under S. 195, Cr.P.C. [*Rama Aiyar* v. *Venkatachella Padayachi*[1] followed.]

Petition under Sections 195 (*b*), 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the District Magistrate of Salem in Criminal Revision Case No.31 of 1908 presented against the order of the Stationary Second Class Magistrate of Namakkal in Miscellaneous Case No. 10 of 1908.

K. Ramanath Shenoi for the petitioner.

The Public Prosecutor (*C. F. Napier*) contra.

The Court made the following

ORDER :—In the case of *Rama Aiyar* v. *Venkatachella Padayachi* [1] it was held that a District Judge had no jurisdiction to order further inquiry by a District Munsif in regard to a matter dealt with by him under S. 195, Criminal Procedure Code. It was held that such jurisdiction was not inherent, because not incidental to the proper exercise of the powers given to the District Court by the section, nor were they given by any section of the Civil or Criminal Procedure Codes. Though that was in a Civil Court and the present case arose in a Criminal Court, we think the same reasoning must be held applicable.

* Cr. Rev. C. No. 83 of 1909. 23rd July 1909.
Cr. Rev. P. No. 67 of 1909

1. (1907) I. L. R. 30 M. 311.

In re Krishna Reddi.

The power to take, or call for, further evidence, given by S. 428, Criminal Procedure Code, is expressly limited to appeals under that chapter, *i. e.*, under Chapter 31 of the Code. Section 195 is not part of that chapter, nor does the section itself give any power to call for further evidence.

We must, therefore, hold that the District Magistrate had no power to make the order calling for further evidence. We set aside the order and direct the District Magistrate to restore the case to his file and deal with it according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

Sundara Bai Sahiba .. .. Appellant*
(*Plaintiff*)

v.

Tirumala Rao Sahib and another .. Respondents
(*Defendants*).

Sundara Bai v. Tirumala Rao.

Letters Patent, Cl. 12—"Suit for land"—Suit for maintenance charging it on specific property.

A suit which prays for any relief with reference to any specific property is a suit for land ; and consequently a suit for maintenance praying that it may be made a charge on specific immoveable property is a "suit for land" within the meaning of Cl. 12 of the Letters Patent.

Obiter.—But where in a suit for maintenance the plaintiff only prays for a decree charging her maintenance on ancestral property generally, without specifying any particular portion thereof, the suit may not be a suit for land.

Appeal from the decree of Mr. Justice Boddam in C. S. No. 164 of 1905.

This was a suit by a widow for maintenance which she wanted to have charged upon certain specific immovable property in Madras—the only ancestral property available. On defendants' (sons') objection the suit was dismissed on the ground that the Court had no jurisdiction, on the ground that the suit was not one for land or immoveable property under S. 12 of the Letters Patent. The Judge allowed Rs. 25 a month for the plaintiff's maintenance, and three years' arrears on this basis. The Judge held that the defendants were not *residing* in Madras but were only temporary visitors.

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*O. S. A. No. 82 of 1906. 25th August 1909.

Sundara Bai v. Tirumala Rao.

L. A. Govindaraghava Aiyar and *G. Krishnaswami Aiyar* for plaintiff-appellant.

V. Krishnaswami Aiyar, *C. P. Ramasami Aiyar* and *C. K. Mahadeva Aiyar* for defendants-respondents.

L. A. Govindaraghava Aiyar.—A suit for maintenance which asks for a charge on immoveable property is a suit for immoveable property. The Original Side will have jurisdiction if the property be in Madras. The right to maintenance is a *real* right —*Ramanadan* v. *Rangammal*[1] ; *Saminatha* v. *Rangathammal*[2] ; *Kalpagathchi* v. *Ganapathi Pillai*[3]. The expression "suit for land or other immovable property" has to be literally construed—*Nalam Lakshmikanthan* v. *Krishnaswami Mudaliar*[4]. "Suit for land" is a suit "directly affecting land"—*Dose Thimmanna* v. *Krishna*[5]; *Mokhoda Dassee* v. *Nundo Lall Haldar*[6] ; *The Delhi and London Bank* v. *Wordie*[7]; *Kellie* v. *Fraser*[8]; *Manika Gramani* v *Ellappa Chetti*[9]; *Vaghoji Kuverji* v. *Camaji Bomanji*[10]; The defendants are living within the jurisdiction of this Court. As to the quantum of maintenance, the plaintiff's husband who was receiving, besides the income from the land, an allowance of Rs. 250, paid her Rs. 50 a month out of the Rs. 250. Plaintiff's sons are getting Rs. 160 in the place of Rs. 250 got by the father, besides being in possession of property got by them on partition which amounts to Rs. 50,000. The fact that subsequent to the partition, the defendants, sons, have wasted much of their property is no reason for reducing the amount of plaintiff's maintenance. The plaintiff has not contributed to the waste. Arrears of maintenance also ought to be given for more than 3 years.

V. Krishnaswami Aiyar.—A suit for maintenance is not a "suit for land." A suit for land is one for recovery of land or for sale of the land. A suit for maintenance is a suit for money only. It is only as a matter of descretion with the Court that the Court gives a charge for maintenance. The discretion which the Court may exercise will not give a title to the plaintiff to any right to

1. (1888) I.L.R. 12 M. 260.
2. (1889) I.L.R. 12 M. 285.
3. (1881) I.L.R. 3 M. 184, 191.
4. (1903) I.L.R. 27 M. 157.
5. (1906) I.L.R 29 M. 508.
6. (1900) I.L.R. 27 C. 555.
7. (1879) I.L.R. 1 C. 249, 263.
8. (1877) I.L.R. 2 C. 445, 463.
9. (1896) I.L.R. 19 M. 271.
10. (1904) I.L.R. 29 B. 249.

any *particular* land. A suit for a conveyance of land is not a suit for land. If the defendants' lands be very large, courts generally refuse to give a charge. *Nalam Lakshmikantham* v. *Krishnasami*[1] is a case of enforcing a security on land already had. The observation there is also *obiter* of a single Judge. *In re Leslie* [2] is a case of a suit for sale. *Mokhoda Dassee* v. *Nundo Lall Haldar*[3] is a judgment of a single Judge, and he does not decide this question. Right to maintenance is no *real* right—Mayne's *Hindu Law*, 7th Edn. p. 694 ; Transfer of Property Act, S. 39. Unless there is any right in the property sued for before the suit, the suit is not one for land. The suit is for the creation of a right in land after the suit. *The Delhi and London Bank* v. *Wordie*[4] is a suit by a creditor to remove certain trustees, to appoint a receiver and to direct a *sale* of land to realise what was due to the creditor. *Kallie* v. *Fraser*[5] is a case in my favour, *vide* p. 463. The fact that the title to a certain land is in dispute in a suit will not make it a suit for land—*Land Mortgage Bank* v. *Sudurudeen Ahmed*[6]; *H. H. Sri Holkar* v. *Dadabhi Cursetji Ashburner*[7] a case of suit for sale on a mortgage ; *Venkobai* v. *Rambhaji*[8] ; *Sorabji Eursetji Sett* v. *Rattonji Daddbhi*[9] a suit for foreclosure. *Vaghoji Kuverji* v. *Camaji Bomanji*[10] is a suit for declaration of right to land and for injunction which means asking for everything connected with land. Similar is *Mokhoda Dassee* v. *Nundo Lall Haldar*.[3] *Dose Thimmanna* v. *Krishna*[11] does not affect the present question whether it is a suit 'for land.' There is no argument based on defendants' residence in Madras, advanced by the plaintiff. As to the quantum of maintenance, the plaintiff made us oppose the grant of a probate of a will of our father which was finally granted. The defendants' properties are one and all heavily encumbered. The plaintiff is a wealthy lady. What has been allowed her every month, *viz.*, Rs. 25, is correct, and sufficient, considering the circumstances of the case.

L. A. Govindaraghava Aiyar replied commenting on the cases cited.

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1. (1903) I.L.R. 27 M. 157.
2. (1872) 9 B.L.R. 171.
3. (1900) I.L.R. 27 C. 555.
4. (1879) I.L.R. 1 C. 249.
5. (1877) I.L.R. 2 C. 445, 463.
6. (1892) I.L.R. 19 C. 358.
7. (1890) I.L.R. 14 B. 355, 358, 359.
8. (1872) 9 Bom. H. C. 12,
9. (1898) I.L.R. 22 B 701.
10. (1904) I.L.R. 29 B. 249.
11. (1906) I.L.R. 29 M. 508.

Sundara Bai v. Tirumala Rao

The Court delivered the following

JUDGMENT :—The plaintiff, a widow, sues the defendants, her sons, for maintenance.

She prays that her maintenance may be charged on certain immovable property situated within the local limits of the Original Jurisdiction of the High Court.

Her suit is dismissed on the ground that the High Court had no jurisdiction to entertain the suit.

The question is whether the suit is "for land within Clause 12 of the Letters Patent." It is contended that suits for the recovery of possession alone fall within the clause. The High Court of Calcutta has held that suits to establish title to land, suits for foreclosure, sale, redemption, and suits for specific performance of contract for sale of land, are suits for land, and in a judgment in which the question was fully considered, *Moore* J. held that a suit for sale is a " suit for land", following certain Calcutta decisions— see *Nalum Lahshmikantum* v. *Krishnaswami Mudaliar* [1] and the Calcutta cases referred to therein ; also *The Delhi & London Bank* v. *Wordie*[2]; *Kellie* v. *Fraser*[3]; *Sreenath Roy* v. *Cally Doss Ghose* [4] ; *Land Mortgage Bank* v. *Sudurudeen Ahmed* [5].

In Bombay, in the cases reported in *Venkoba B. Kasar* v. *Rambhai Jvalad Arjun*,[6] *His Highness Shrimant Maharaj Jasvantrav Holkar* v. *Dadabhai Cursetji Ashburner* [7]; the Judges took the contrary view, but in *Sorabji* v. *Ratanji*[8], *Strachey* J. expressed his opinion that in the absence of authority on the point he should have had great difficulty in holding that a suit for foreclosure is not a "suit for land." The authority of these decisions would be considerably shaken if they were not overruled by the later decision in *Vaghoji* v. *Camaji*[9]. The decisions of the Calcutta High Court are based on the ground that any suit in which a decree is asked for, operating directly on the land, is a suit for land. This is in accordance with the principle that all questions relating to

1. (1903) I.L.R. 27 M. 157 at p. 161.
2. (1870) I.L.R. I.C. 249.
3. (1877) I.L.R. 2 C. 445.
4. (1879) I.L.R. 5 C. 82.
5. (1892) I.L.R. 19 C. 358 at p. 361.
6. (1872) 9 Bom. H.C.R. 12.
7. (1890) I.L.R. 14 B. 353.
8. (1898) I.L.R. 22 B. 701 at page 704.
9. (1904) I.L.R. 29 B 249.

land should ordinarily be decided by the Court within the limits of whose jurisdiction it lies. We are, therefore, inclined to hold that a suit which prays for any relief with reference to any specific property is a suit for land. The plaintiff's right of maintenance is not merely a personal obligation. It is a real right, but it is not a charge on any other proprietary right until it is referred to specific property by contract or decree.

Where, therefore, in a suit for maintenance the plaintiff only prays for a decree charging her maintenance on ancestral property without specifying any particular portion of that property, the suit may not be a suit for land as she does not claim any relief against any specified property. But where she claims to have her maintenance made a charge on specified immoveable property, we are of opinion that she prays for a decree to operate directly on the land. The decree to be passed, if she succeeds, is a decree against that property. If the defendant fails to pay her decree debt, it may be sold, if the decree is so framed, for the purpose of discharging the same.

We are, therefore, of opinion that the suit is "for land."

The only question that remains for consideration is the rate of maintenance. There is evidence that during her husband's lifetime the plaintiff was living apart, and, under Exhibit *C*, she was to get for her maintenance a sum of Rupees 50 (fifty) a month. Since then she has become a widow. The sum of Rs. 250 (two hundred and fifty) which the former Jaghirdar paid to the family has been reduced to Rs. 160 and there has been litigation in which the members of the family were involved. Taking these circumstances and the state of the family into consideration, we think that maintenance may be awarded at the rate of Rs. 40 a month. The plaintiff is also entitled to arrears of maintenance for 3 years prior to date of suit at that rate.

The maintenance accruing due from this date will be payable on or before the 10th of every month. We, therefore, pass a decree for maintenance at the above rate and direct that such maintenance as well as arrears be made a charge, as prayed for, on the property specified in the plaint.

The arrears decreed will be paid in three equal instalments, the first instalment to be paid on or before the 15th November next, and the other instalments at intervals of four months from that date. We further direct that on default the said property

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may be sold in execution to discharge the amount due. Both parties will pay and receive proportionate costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Sri Sethuramaswamiar and others .. Appellants* (*1st, 3rd, 4th Defendants*)

v.

Sri Meruswamiar and others .. .. Respondents (*Plaintiffs and Defendants* 2, 5, 6 *and* 7).

Hindu Law—Mutt—Head of mutt—Property acquired by — Ownership in—Management of charity properties—Division of.

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Where the heads of a mutt are married people and are competent to acquire property for themselves and their descendants, including the female members of their family, there is no presumption that properties acquired by them were acquired for the office of mutt and not for their own use and benefit.

The right of management of properties devoted to charitable and religious uses ordinarily descends to the natural heirs of the donee [*Ramanathen Chetti* v. *Murugappa Chetti*[1], *Thandavaroya Pillai* v. *Shunmugam Pillai*[2] referred to and approved] and in the case of a divided Hindu family, the usage and custom generally is that along with the other properties the office of manager of the charity properties is also divided in the sense that it is agreed to be discharged in rotation by each member or branch of the family, the duration of their turns being proportionate to their shares in the family property.

Appeal from the decree and judgment of the Court of the Subordinate Judge of Tanjore in O. S. No. 61 of 1904.

V. Krishnaswami Aiyar and *A. S. Balasubramania Aiyar* for 1 to 3 appellants.

N. Rajagopalachari for 1st appellant.

The Advocate-General (P. S. Sivaswami Aiyar), T. R. Krishnaswami Aiyar and *S. Varadachari* for respondent.

The suit is for partition of certain properties and of a right to the trusteeship of certain lands endowed for charitable and religious purposes. The 1st defendant is the eldest brother, plaintiff is the 2nd brother, and the 2nd defendant, the 3rd brother. Defendants 4 and 5 are 1st defendant's sons, and the other defendants are the mother and step-mothers of these 3 brothers. The first defendant contended that the 1st set of properties and the trusteeship of the charity properties were impartible on the ground that they

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* A. 52 of 1907. 18th August 1909.

1. (1903) I.L.R. 27 M. 192. 2. (1908) I.L.R. 32 M. 167.

were attached to his office of Guru of the Raja of Tanjore and to the Mutt called Sethu Bhava Swami Mutt of which he and his four ancestors were the heads. The Sub-Court held that though the practice prevailing in the family, which was a Grahasta one, resembled those of Goswamis, and though the house of these three brothers was known as a Mutt, the properties were partible as the grants to the ancestor by the Raja were purely personal to the several grantees and not in virtue of their office of Raja Guru or as Matathipathi; that the properties were treated by all the holders, including the 1st defendant, as private properties; that there was no proof of impartibility, and that the 1st defendant was estopped by his conduct from pleading impartibility and that the trusteeship also was divisible just like the other properties. *A. S. Balasubramania Aiyar* referred to the evidence that there was an office of Raja-Guru.

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V. Krishnaswami Aiyar, continuing, argued:—Plaintiff himself has admitted that the habitation of the family is called a Mutt and that all the practices there resemble those of a Mutt. The practices are:—On the death of one head another is installed on the *Gadi* as Raja-Guru by the Raja and as Matathipathi by other Matathipathis. That person wears special robes, begs for alms, wears a dhandam or stick, all like an ascetic. There is a flag and a seal for the Mutt. Upadesams are given to disciples. Bhajanas are held in the Mutt and there is a regular establishment of servants of the Mutt. There are Samadhies (tombs) for the deceased holders of the place. Punyathidhies (anniversaries) are performed not only for the last holder but for all the previous holders. All the holders had spiritual names as soon as they came to the office and were known only by their spiritual names. The 1st defendant and his ancestors were called Goswamis. A Goswami is a spiritual teacher, sometimes ascetic, sometimes of married life.—West and Buhler, Vol. I, pp. 552, 554; *Gosain Rambharati* v. *Mahant Suraj Batarati*[1]; Wilson's Glossary p. 183. Oral and documentary evidence to show that there is a Mutt was then referred to. Even a married man can be a Matathipathi. For the definition of *Athinam* which the present mutt is, see *Giyana Sambanda* v. *Kandasami*[2]; *P. R. Ganapathy Aiyar* on *Religious Endowments*, p. 105 of Introduction; *Satianama Bharati* v. *Saravanabagi Ammal*[3]. For the use of flag, seal, etc., as emblems of a Mutt, see *Vidyapurna* v. *Vidyanidhi*[4]. The evidence to show the existence of these special signs which show that there is a

1. (1880) I.L.R. 5 B. 682.
2. (1887) I.L.R. 10 M. 387.
3. (1894) I.L.R. 18 M. 267, 270
4. (1903) I.L.R. 27 M. 435.

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Mutt was then referred to. The practices of the family show it was a Mutt. If it is a Mutt, plaintiff must establish the rule of succession in order to entitle him to succeed—*Janoki Debi* v. *Gopal Acharjia*[1]; *Greedharee Doss* v. *Nundokissore Doss*[2]; *Raja Vurma* v. *Ravi Vurma*[3]; *Giyana Sambanda* v. *Kandasami*[4]; *Genda Puri* v. *Chatar Puri*[5]; *Raja Muthuramalinga* v. *Perianayagam*[6]. Secondly, as regards the division of trusteeship of charity properties, I submit that it cannot be divided—*Sri Raman Lalji Maharaj* v. *Sri Gopal Luli Maharaj*[7]; *Ramanada* v. *Murugappa*[8]; *Thandavaroya Pillai* v. *Shunmugam Pillai*[9]; Mitakshara Chap I; Sec. IV *Placitum*, 16, 27. Thirdly, as to partibility said to have been acquired by plaintiff by adverse possession, mere assertion will not do. There must be actual enjoyment. Receiving maintenance from 1st defendant negatives such enjoyment—*Raghunath Bali Maharaj Bali*[10].

The Advocate General.—This is an ordinary suit for partition. The defendant relies on a custom of impartibility. *Prima facie* the onus of proving the impartibility lies on the defendant. Various theories were advanced as to how it was impartible. As to onus of proving impartibility see *Laka Muddun Gopal* v. *Khikhindra Koer*[11]; *Adrishappa* v. *Gurushiddappa*[12]; *Vinayak* v. *Gopal*[13]. There is no evidence to shew that there was any " office of Raja-Guru." The term Raja-Guru appears only in recent documents and it is merely descriptive of the profession of the person. Unless there was an office orginally, and unless the grants were expressly made for the office, the lands granted cannot become impartible. Simply because the grantee happened to be the priest of a rich and influential man it cannot be held that the priesthood was an office. Nor would a grant to him be in his capacity as officer—*In re Delaney*: *Conoley* v. *Quick*[14]; *Donellan* v. *O'Neill*[15]. With the extinction of the *Raj* the office of the priest to Raja also has ceased, and naturally the lands become liable to division. Then evidence was referred to to show (*a*) that the original grants by the Raja, and the subsequent confirmation of the same by the British Government, were all personal; (*b*) that the properties were treated by

1. (1882) I.L.R. 9 C. 766, 777.
2. (1867) 11 M.I.A 1 at 405, 468.
3. (1876) I.L.R. 1 M. 235, 250, 251.
4. (1887) I.L.R. 10 M. 375.
5. (1886) 13 I. A. 100.
6. (1874) 1 I. A. 209, 228.
7. (1897) I.L.R. 19 A. 428.
8. (1903) I.L.R. 27 M. at 201.
9. (1903) I L.R. 32 M. 167.
10. (1885) I.L.R. 11 C. 777, at 784. (P.C.)
11. (1890) I.L.R. 18 C. 341 (P.C.)
12. (1880) I L.R. 4 B. 494, 499 (P.C.)
13. (1903) I.L.R. 27 B. 353, 355 (P.C.)
14. (1902) 2 Ch. 642.
15. (1870) Ir. R. 5 Eq. 523.

all the holders as private property enabling them to alienate as such, and (*c*) that the 1st defendant conducted various legal proceedings against others along with his brothers for a period of at least twelve years, whether as plaintiffs or defendants. The 1st defendant was, by all this, estopped from contending that the properties were impartible.

As regards the right to partition the trusteeship, vested in the family, of properties endowed for charitable and religious purposes, *Ramanada* v. *Murugappa* [1] was referred to as showing the practice.

The Court delivered the following

JUDGMENT:—Plaintiff sues for partition and delivery to him of one third of the properties annexed to the plaint which are claimed to be the properties of the joint family consisting of himself and of the 1st and 2nd defendants. He also prays for the settlement of a scheme for the management of the charitable and religious endowments mentioned in Part II of the 2nd Schedule.

The defence of the 1st defendant is that the properties are impartible. His contention is that he and his ancestors were the hereditary Gurus of the family of the Maharajahs of Tanjore, and these properties appertain to the office of Guru as such. He further contends that his ancestor who was brought to Tanjore as his Guru by the then Maharajah was also the head of a Mutt and that these properties appertain to that Mutt. The Subordinate Judge has found that the parties formed an ordinary Hindu family and has decreed partition. This is an appeal against that decision.

Most of the properties specified in parts I and II of Schedule II were given by the then Maharajah of Tanjore to one Sri Sethu Bahva Swami stated to be a disciple of the Meruswami Mutt in Mannargudi. He had an only son, Sri Rama Sethu Swami, who left an adopted son, Sri Sethu Ramaswami, who died in 1854. His adopted son, Sri Rama Sethu Swami, died in April 1886, leaving three sons, the plaintiff and the 1st and 2nd defendants, and 2 daughters. From the date of the gift there was no occasion for partition. That gift seems to have been made by the Maharajah to Sethu Bhava Swami as the latter was accepted by the Rajah as his Guru. Till the extinction of the *Raj* the ancestors of the 1st defendant continued to be the Gurus, and after the resumption of the *Raj* by the British Government, the 1st defendant's father, and after him the 1st defendant, continued to be

1. (1903) I.L.R. 27 M. 193, 201.

recognized as Guru of the Royal family. It is the case of the 1st defendant-appellant that the gift was made to his ancestor on account of his being the Rajah's Guru and those properties together with the rest which form an accretion to that estate are attached to that office of Raja-Guru, cannot be separated therefrom and are therefore impartible.

Sethu Bhava Swami, it is said, also established a Mutt, and it is contended these properties appertain to that Mutt. Mutts are usually associations of celebates devoted to divine worship, who give *upadesam* or instructions to deserving candidates. There are also Mathams of which the members are allowed to marry. The house in which they live is also called Mutt. The office of the Raja-Guru and the Lordship of the Mutt are attained at the same time.

The first defendant's predecessors were all married men when they became Rajah-Gurus. His father is not alleged to have become a Sanyasi. His grandfather and great-grand-father became Sanyasis in their last moments. The disciples do not live with the 1st defendant. There is no doubt the residence of the 1st defendant is generally called a Mutt. It is, however, also called 'Aramanai' by some and 'house' by others.

In support of his contention that there is an office of Guru of the Tanjore Maharaja's family the appellant relies upon the ceremonies which were performed at the time when, on the death of one Guru, the eldest son succeeded to the office. Evidence has been given in this case of the ceremonies of the 1st defendant's installation. It appears that a few days before his father's death, in the presence of the heads of certain other Mutts, the 1st defendant was taught Ramamanthram by his father and a few days after his death he was installed as the head of the Mutt. Various persons were invited to attend the said ceremony. The 1st defendant was made to wear a dress made of Kashaya cloth which the head of the Mutt should wear. He was made to sit on what is called an 'Adhistanapalaki" which consists of two wooden planks, one to sit on and the other to lean against. The head of Meruswami Mutt who is said to be the Guru hereditarily of the 1st defendant's Mutt, placed the 1st defendant on that seat. Then his disciples made obeisance to him and he gave *upadesam* to one or two of the disciples. The representative of the Maharajah's family then placed him on what is called the *Gadi* which is a raised seat with a mattress on it. He had the dhandam (stick) given him. After that he started on a procession from his house, went to the Hanuman

Temple and as far as the Rajah's palace, and after receiving alms from the palace he came back. It is said that no other person is entitled to sit on the *Gadi*, and the right to sit on the *Gadi* is supposed to have been conferred upon the first defendant and his predecessors as they were the Gurus of the Royal family of Tanjore.

It is also alleged and proved that a flag is raised on the new year's day on the Mutt and that the anniversaries of all the predecessors of the 1st defendant are also performed. The sandals used by the predecessors of the 1st defendant are worshipped on the respective anniversary days.

The 1st defendant and his predecessors, in addition to their ordinary names, have also got spiritual names, the first defendant being called Chitgnana Brahmam, his father was called Sachit Sukananda Brahmam, his grandfather Ananda Brahmam, and his grand fathers' father Vimala Brahmam, and his father, the first Guru, Taraka Brahmam.

The 1st defendant's predecessors, except his father, who were Gurus had also Samadhis. These facts are, no doubt, clearly proved and they show, undoubtedly, that the family is one of great importance in that locality. They have been called Rajah-Gurus no doubt from their having been the Gurus of the Maharajahs of Tanjore. It is also clear from the evidence that the 1st defendant and his predecessors were also called Madhathipathis.

The question for our consideration is, however, whether these are properties attached to this office or belonging to the Mutt as such, and for that reason whether they are impartible.

In order to decide this question we have to consider the documentary evidence adduced. Exhibit C series are apparently the *Sanads* by which the Maharajahs of Tanjore granted the properties in Part II of the 2nd Schedule as well as the properties shewn in Part III of the said Schedule, which are admittedly directed to chairtable purposes, to the predecessors in title of the 1st defendant. The earliest of them, Exhibit C, is of 1739 and the latest of them is about 1760. Exhibit C 3 purports to be a grant made by the Maharajah of Tanjore to Rajah Sri Setugoswami Bava. It is not stated to have been given to him for the maintenance of the office nor was it given to him as the head of the Mutt. His spiritual name also is not given. The *Sanad* itself is in the form of an order issued to the officials by the Maharajah, reciting that these grants have been made to Sri Sethu Bava

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Swami with the exception of Exhibit C 3 where he is styled Goswami. There is also a direction in the *Sanad* wich is translated thus:—" Let it be conducted from sons to grandsons in succession. Let not the objection of a renewed document itself be taken every year."

The appellants' pleader relies upon these words to show that this '*Sanad*' cannot be treated as evidence of an absolute personal gift since the obligation is laid upon the Revenue officials to see that the injunctions of the Maharajah are carried out, and it could, therefore, only refer to the performance of the duties by Sethu Bhava Swami of his office or as the head of the mutt. We are unable to accept this construction, in the absence of anything in the body of the document itself, to show that it appertained to the office, or the mutt. It may, probably, be intended to show that any further *Sanad* was unnecessary every year or in case of succession on the grantee's death.

In the case of the properties which were granted for charitable and religious performance, the purpose is recited in the *Sanad* itself (Exhibit C2) and there is a specific direction : " Let the charity be conducted perpetually." On a comparison of these two recitals it appears to us to be clear that these were only directions to the officials by the Maharajah to see that in the case of the charities they were properly performed and in the case of the other properties the descendants of the grantee enjoyed them. After these *Sanads* by the Tanjore Rajah, the only other *Sanad* that we have is Exhibit II which purports to be a grant of a village by the then Governor of the Madras Presidency in exchange for some salt-pans which the Government seems to have taken up for public pnrposes. This was in 1806. In that the grantee is described as the domestic priest to the Maharaja of Tanjore.

Of course the property newly granted possesses the same incidents as the one resumed. In the absence of any recital in Exhibit II itself to show that these properties were either attached to the office or they were granted to the Madathipathi, we must assume that they were held on the same tenure as the properties of the grantee under the (C) series were held.

The Tanjore *Raj* was resumed by the British Government about 1855. The grandfather of the 1st defendant died in the year 1854, and in 1856 his widow presented a petition to the Board of Revenue in which, after referring to her husband's death and his adoption, before his death, of the 1st defendant's father, she stated that his installation ceremony, including procession, was not performed either by her husband or the Maharajah

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" to qualify him for my husband's *adhinam* and the Maharajah's priesthood," and she stated that until the *abhishekam* is performed he is ineligible for the priesthood. And she also stated that in collusion with the subordinate revenue officials, the first defendant's father, without her own consent and without the permission of the Rajah of Tanjore, had performed the *abhishekam* and the procession and taken possession of the properties. She alleged that till then the property was in her possession. But the Board of Revenue referred her to the officiating Resident. There are statements made by the widow about her husband's *adhinam* and the necessity of an installation, which support the 1st defendant. But her claim to hold the properties is against him. The properties, however, seem to have have been placed under attachment, a report called for, and the matter in dispute appears to have been finally disposed of by an order which is Exhibit Z in the case. That order was mainly based upon a report by the then Commissioner of Tanjore. The Commissioner referred to the death of the Swami in 1854. He also said that the adoption was perfectly legal, and conferred on the adoptee the first defendant's father, all the rights of the deceased Swami. With reference to the properties which were called "Swamy Inams", he was of opinion that the Inams would necessarily fall into the hands of the adopted son. He further pointed out that it was the practice of the Tanjore Rajahs themselves to appoint as Managers of the Estates persons for whom the Rajahs entertained feelings of regard, and that in the case of this family the agent of the Rajah's estates had, for some time after 1826, been also looking after the affairs of the Inams, but that the Inam proceeds never reached the servants of the Rajah as such, and that " the revenue devided from the Inams as well as the Inams themselves were in nowise interfered with by the Rajah, and the Swami was quite free to hoard or dissipate their produce as to him seemed best," * * " No accounts were rendered to the Rajah himself or to any one about his durbar or person. "

If the Rajah was interested in those properties, it is scarcely likely that the Rajah's officials would have refrained from any such interference, more especially when we take into consideration the fact that the native Rajahs in ancient days actively interfered in the management of religious institutions.

Then, in finally passing orders, the Government observed that the lands could in no way be treated as service lands or endowments attached to the priestly office confined for the perfor-

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mance of duty but that they were simple personal grants unconditionally bestowed from favor and affection, and the properties were accordingly made over to the first defendant's father. Those assigned for the maintenance of chattrams (charities) were charged. with the support of the institutions for which they were granted, This is undoubtedly strong evidence against the first defendant's contention.

In the subsequent inquiry by the Inam Commissioner, that officer seems to have acted on the same view. Exhibit L series are extracts from Inam Registers and Exhibit D series are the Inam title-deeds. The title-deeds of the lands which were granted for charitable purposes, those in Part III of the Plaint Schedule, were granted to the 1st defendant's father, as the Manager for the time being, and his successors so long as the charity and the religious institutions are properly maintained. The lands which were treated by the Government as personal Inams were confirmed to the grantee and his heirs as personal Inams. If these lands were attached to the office, it was probably open to the Government to have resumed them. If they were properties belonging to the Mutt, they would certainly have been so treated. The conduct of the 1st defendant's father after obtaining possession of the properties also is only consistent with the same view as was adopted by the Government and the Inam Commissioner. In 1867 he sold certain properties for a sum of Rs. 5,000. In 1875 he made a gift of certain properties to his foster-daughter, and in 1877 he sold certain other items of property for Rs. 14,000. In 1878 he mortgaged certain other properties for a large sum of Rs. 60,000. In all these, the properties were treated by him as his own, and a security bond (Exhibit A3) executed by him contemplates the possibility of a suit for partition. But there is no suggestion anywhere of the properties appertaining to either the office or to the Mutt.

When he appointed an agent in 1878 he specified certain properties as chattram properties and the other properties he treated as his own. The first defendant's father died in the year 1886, when he (the first defendant) was a minor. The Court of Wards seems to have taken possession of the property and managed it till 1889. They managed the property not only on behalf of the 1st defendant but on behalf of the 1st defendant and his brothers (see Exhibits T, T1, and T2) and they never attempted to dispute the validity of any of the alienations made by the 1st defendant's father on the ground that he had only a life interest in the

property and that they appertained to the office of Guru or that they belonged to the Mutt.

The first defendant seems to have succeeded to the management in 1890. He also recognised his father's alienations and undertook to discharge the balance of what remained due of the debt of Rs. 60,000 under Exhibit A4. On that occasion, Exhibit A(9), he treated the property as family property, neither the office nor the Mutt being referred to. Suits were brought not against the 1st defendant solely but against the 1st defendant and his brothers, with reference to these properties by third parties, and in the written statement filed by the 1st defendant and his brothers and in the Razi that followed (see Exhibits O and O3) the properties were treated as joint family properties and then a decree for specific performance was passed against the 1st defendant and also against his brothers, not against him alone (see Exhibit O4). Similarly he filed suits with his brothers as a plaintiff. On one occasion he seems to have protested on the ground that he alone is entitled to sue and that it was unnecessary to make others parties to the suit as he was in exclusive possession of the estate on that occasion. The Sub-Collector pointed out that he originally sued as the managing member of an undivided family and refused his prayer.

After the estate was delivered to the first defendant by the Court of Wards in 1890, puttahs were granted by him in the capacity of the manager of an undivided family (Exhibit E).

Mortgages were taken in the name not only of the 1st defendant but also of his brothers, and the discharge was also signed by them all. All this evidence can only lead to one conclusion, and no document has been referred to before the date of this plaint in which the 1st defendant ever asserted his exclusive title as against the other members of the family.

Assuming that the defendant's predecessors were holders of an office or heads of a Mutt they were also competent to acquire property for the benefit of themselves and descendants, including the female members of the family, and there is no presumption that properties acquired by them were acquired for the office or Mutt and not for their own use and benefit. Other members of the family also may have acquired properties. The properties referred to in Exhibit L 14 included in this suit are alleged to have been acquired by a lady who is a member of this family. It would require strong evidence to show that these properties also were devoted to the office or Mutt.

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There is nothing in the account books to show that these were treated as trust property.

For these reasons the appellant's contention must be disallowed.

It was further contended that the management of the family properties devoted to charitable or religious uses descended according to the rule of primogeniture and the plaintiff as junior member is not entitled on partition to any share therein. We are unable to accept this contention. It is now well settled that the right of management ordinarily descends to the natural heirs of the donee (Mayne, 439) and there is nothing to take the present case out of the rule. The authorities are collected by *Bhashyam Iyengar* J. in *Ramanathan Chetti* v. *Murugappa Chetti*[1]. The way in which the right of management is enjoyed is stated by the learned Judge as follows:—"Except in the few cases in which the hereditary office may be descendible only to a single heir, the usage and custom generally is that along with other properties the office (of manager) is divided also in the sense that it is agreed to be held and the duties thereof discharged in rotation by each member or branch of the family, the duration of their turns being proportionate to their shares in the family property. Even in cases in which recourse is had to a suit for the partition of the family property, the Courts give effect to the usage and custom referred to providing for the management of religious and charitable institutions by different members or branches of the family in rotation on the above principles." There can be no doubt that these statements are correct. The case of *Nab Kisten Mitter* v. *Harrischunder Mitter*[2] appears to show that the usage and custom were well established as far back as the year 1818, and it is now too late to question them. It will be observed that the enjoyment is stated to be divided between the different members or branches of the divided family, and this is in accordance with the recent decision of this Court in *Thandavaroya Pillai* v. *Shunmugam Pillai*[3] that the managing member of an undivided family has the right to manage the family charities and that the other members of the family have no right to participate in the management so long as they continue undivided.

We therefore dismiss the appeal with costs.

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1. (1903) I.L.R. 27 M. 192. 2. Morley's Digest, 146.
3. (1908) I.L.R. 32 M. 167.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir R. S. Benson, Officiating Chief Justice, and Mr. Justice Miller.

Muthayya Reddi and others .. Appellants *
v. (*Defendants*)
Sudalaimuthu Nadar .. Respondent
(*Plaintiff.*)

Muthayya v. Sudalai muthu

Tort—Highway—Procession —Right to go in—Cause of action—Special damage when not necessary—Magisterial prohibitory order, good cause of action.

Magisterial orders prohibiting people from going in procession in public streets are, without special damage, a cause of action for the sustainability of suits by a member of the public for a declaration and injunction with regard to their right to go in procession.

Second Appeal from the decree of the District Court of Tinnevely in A. S. No. 435 of 1905 presented against the decree of the Court of the District Munsif of Tuticorin in O.S. No 415 of 1904.

Plaintiff's suit for a declaration of his right to go in procession was decreed on the ground that the street in which he wanted to go was a public street and that the various Magisterial orders which prevented him from so doing gave him a cause of action though he was unable to prove special damage.

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for defendants-appellants.

John Adam for plaintiff-respondent.

P. R. Sundara Aiyar :—Simply because a Judge finds that all classes of people have been passing and repassing, he would not be justified in finding that the street is a public street. The fact that some classes were not going in procession in the streets till now must be considered in determining whether the street is public. Extent of the user determines the extent of the dedication—*vide* PRATT on *Highways*, p. 44; *Milner's Safe Co.* v. *Great Northern and City Ry.*[1] Merely procuring an order of the Magistrate prohibiting procession will not give a cause of action. The plaintiff being only a member of the public, must prove special damage—*Satkuvalad* v. *Ibraim*[2]; *Kaji Sugaudi* v. *Madhvadas*[3]. Otherwise many suits will be filed. There must

* S. A. 793 of 1906. 23rd August, 1909.

1. (1907) 1 Ch. 208. 2. (1877) I.L.R. 2 B 457.

3. (1893) I.L.R. 18 B. 693.

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be an order of the Government prohibiting processions permanently.

John Adam:—It is not necessary to prove any special damage. The plaintiff's right to go in procession has been infringed—*Koonhi Meera* v. *Mahomed Meera*[1]. The fact that no procession was had till now will not show that the street is not a public street. The order of a Magistrate prohibiting a party from going in procession gives a cause of action—vide *Kandasami Moodali* v. *Subbaroya Moodali*[2]. There is a finding that it is a public road. Every one has a right to go in procession in a public road—*Sadagopachariar* v. *Krishna Moorty Row*[3]; *Sadagopachariar* v. *Rama Row*[4].

The Court delivered the following

JUDGMENT:—There is a finding by the District Judge that the streets are public streets and ample evidence to support it.

As to the cause of action we think the orders of the Magistrates—which they intended to renew from time to time until made permanent—furnished a cause of action just as much as the Government Order which was held in *Kandasami Moodali* v. *Subbaroya Moodali*[2] to have this effect.

The appeal is dismissed with costs.

The memorandum of objection is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Sri Rajah Velugdhi Govinda Kristna Yachundralu Bahadur, Zamindar Garu of Venkatagiri .. Petitioner* (*Plaintiff*)

v.

Vemaraja Suryaprakasam .. Respondent (*Defendant*).

Madras Acts—Rent Recovery Act, S. 11—Collector's sanction not necessary for charge of water tax.

Zamindar of Venkatagiri v. Suryaprakasam.

The Collector's sanction is not required to the charge of water tax by the zemindar against an inamdar.

Petition under S. 622 of the Civil Procedure Code, praying the High Court to revise the Judgment of the Court of the

* C. R. P. 593 of 1908. 16th April. 1909.

1. (1906) I.L.R. 30 M. 15, 17.
2. (1909) 19 M.L.J. 617.
3. (1907) I.L.R. 30 M. 185.
4. (1902) I.L.R. 26 M. 377, 384.

Zemindar of Venkatagiri v. Suryaprakasam.

Subordinate Judge of Kristna at Ellore in A. S. No. 143 of 1907 presented against the decree of the Court of the District Munsif of Ellore in O. S. No. 322 of 1905.

In this case the lower appellate Court (Sub-Judge) decided, in a suit to recover water rate by the zemindar against an inamdar, that the sanction of the Collector under S. 11 of the Rent Recovery Act was necessary, and that, as it was not obtained, the suit ought to be dismissed with regard to the water rate.

S. Subrahmania Aiyar for petitioner.

Respondent *unrepresented.*

S. Subrahmania Aiyar :—I submit that the Sub-Judge declined to exercise jurisdiction by wrongly deciding the preliminary point. A revision lies against an order declining to exercise jurisdiction on account of wrong decision on the preliminary point—*Rama* v. *Kunji*[1]; *Manisha* v. *Eradi*[2] ; *Kammathi* v. *Mangappa*[3]. There is no question of improvement in the case for S. 11 to operate. The defendant is not a tenant ; he is an inamdar. He has used my water for his dry lands and that is why I claim water tax.

The Court delivered the following

JUDGMENT:—The Collector's sanction was not required to the charge of water tax and this item should have been allowed with the interest on it. We do not find that there was any dispute as to the amount. We modify the decree by allowing the plaintiff to recover the amount claimed as water tax with interest in addition to the amount allowed by the Subordinate Judge. Respondent must pay the costs of this petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Sekharan Nair (dead) and others .. Appellants*

v.

Kongot Eacharan Nair and others .. Respondents

Court-Fees Act, Sch. I, Art. 1 ; S. 7, Cl. IX—"Subject-matter in dispute" in appeal—Redemption suit—Appeal—Attack on redemption right and claim for larger amount by mortgagee as well as mortgagor—Melcharth by trustee of Devasbom—Non-payment of consideration no sufficient ground for holding document sham—Prima facie consideration—Right of kanomdar to question extent of consideration.

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*S. A. No. 718 of 1904. 5th August 1909.

1. (1886) I.L.R. 9 M. 375. 2. (1887) I.L.R. 11 M. 220.
3. (1892) I.L.R. 15 M. 454.

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In suits for redemption and in appeals in those suits wherein the right to redeem forms the main question in dispute, "the subject-matter in dispute" for the purposes of Art. 1, Sch. I, of the Court Fees Act, is the existence of the right to redeem, any question as to the amount payable as the condition of redemption being merely incidental to that right; and the value of the subject-matter is the principal money secured by the mortgage. Consequently, in an appeal from a suit to redeem a kanom, where the appellants (mortgagees) questioned the plaintiff's right to redeem and also claimed a larger amount in case of redemption, the value of the subject-matter in dispute in appeal is the principal money secured by the kanom.

The trustee of a Devaswom gave a melcharth, the melcharthdar undertaking to redeem a prior kanom and pay purapad which was at a rate higher than that under the prior kanom. A sum of Rs. 5000 also said to have been paid as a part of the consideration was found not to have been in fact paid. The prior kanomdar contended that the melcharth was a sham, and, even if intended to be operative, was bad as the trustee in granting the melcharth without receiving the money acted to the prejudice of the Devaswom.

Held: that the circumstance that the Rs. 5,000 had not been paid was no sufficient ground for holding that no interest was intended to pass.

Held further: that even if the Rs. 5,000 was not received by the trustees, there was *prima facie* good consideration for the melcharth and that it was not competent to the kanomdars to question the extent of the consideration.

Second Appeal from the decree of the Subordinate Judge's Court of South Malabar at Calicut in A. S. No. 303 of 1902, presented against the decree of the Court of the District Munsif of Alatur in O. S. No. 401 of 1900.

This was a suit for redemption, plaintiff being the Melcharthdar. Defendants 1 to 14 were the Kanomdars, and 65th defendant, the Tachudaya Kaimal, represented the jenmi—the Kootal Manikkam Devaswom. Defendants 1 to 14 contended *inter alia* that the 65th defendant was simply a manager of the Devaswom, and as such not entitled to grant melcharths, or to sue; that the ownership of the Devaswom was in the Irinjalakuda Sabha and the Cochin Raja, 65th defendant was only their agent; that this matter has been decided in the judgment of the Zilla Court of Anjikaimal (Cochin) which was confirmed on appeal; that the melcharth was not *bona fide* and for proper consideration, and was granted before the expiry of the period of the kanom; that for all these reasons, the plaint melcharth was invalid and that the defendants had an irredeemable right, and were in possession and had cleared jungle land in that belief, and had effected vast improvements and therefore ought not to be evicted. Several issues were raised. But the issues material for this report are: whether the 65th defendant was entitled to grant the melcharth to plaintiff

with power to sue (Issue 3); whether the melcharth is valid and supported by consideration (Issue No. 4); whether the kychit of 1063 is not binding on the defendant's family, and whether properties were not being held thereunder.

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The Munsif found that though the Yogam had some interest in the property, Tachudaya Kaimal, the 65th defendant, was like a Stanomdar and had capacity to exercise, during his management, all the powers of an owner provided he did so *bona fide* and for the necessities of the temple. On the 4th issue he found that the plaint melcharth was not *bona fide* and supported by consideration. This was his reasoning: "The payment of Rs. 5,000 is not evidenced even by the least costly document—a receipt. The melcharth is before the expiry of prior kanom. The *bona fides* of either of the parties to the transaction is not proved. The mere fact that Purapad alone is raised is no criterion of *bona fides*. Defendants are ancient tenants. The perpetual right was not set up till the date of their written statement. * * * Where are the temple account books showing payments? Plaintiff has not satisfied himself whether the payments were entered in those account books. It was a part of plaintiff's case that a sum of Rs. 5,000 also was paid to the 65th defendant as consideration for his giving the melcharth." On appeal the Sub-Judge thought that it was unnecessary to enter into the defendant's plea as to want of consideration. His reasoning was as follows: "There is no doubt some reason to suspect the good faith of the 65th defendant in regard to Rs. 5,000 and odd which the plaintiff says he paid to the 65th defendant, and it may be that the plaintiff is also to be blamed in this connection, especially as the melcharth *A* does not allude to the payment and as the Devaswom accounts that are produced in the case do not show the payment. If the plaintiff's assertion is true, the 65th defendant may have to account for it to the Yogam and the Cochin Raja. But it is immaterial for the defendants whether the 65th defendant has received the said amount or not. It is sufficient that the 65th defendant had the power to grant the melcharth and that he has granted it. The undertaking to pay the amount of the former kanom and to give Purapad to the Devaswom at a higher rate is consideration for the melcharth. His liability to pay compensation

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for improvements to such of the defendants as are entitled to it is also part of the consideration. Under these circumstances, and excluding from consideration the liability of the plaintiff and the 65th defendant to the Devaswom in regard to Rs. 5,000 and odd above referred to, the defendants are not entitled to question the plaintiff's melcharth on the score of consideration." On the issue as to the power of the 65th defendant to grant melcharth, the Sub-Judge held that the defendants themselves having taken the kanom from him, there being also grants of kanom by a predecessor of the 65th defendant, the latter must have the power to renew the kanom, or if in the exercise of discretion he thinks it necessary to grant a melcharth to another man he has the power also to grant such melcharth. He did not give any finding as to the necessity for the Yogam and Cochin Raja being parties to the suit, but he held that they had the right to call the Kaimal to account, he being the person whom they had appointed manager with executive powers of management, &c. As to the plea of perpetual power it was not pressed in the lower Court. The defendants appealed on the ground of non-joinder of the Yogakars, invalidity of the melcharth for want of consideration, &c.

V. Krishnaswami Aiyar for appellants.

C. V. Ananthakrishna Aiyar for respondents.

V. Krishnaswami Aiyar.—The right of the plaintiff to redeem ought to be proved—Fisher, S. 1374, 1376. Though absence of sideration is not in itself conclusive, it is evidence of the colorable nature of the transaction—*Chinnan* v. *Ramachandra*[1]; *Nama* v. *Rautmal*[2]; *Mauladan* v. *Raghunandan Pershad Singh*[3]—or the passing of consideration may be condition precedent to the passing of any interest under the conveyance—*Sheo Narain Singh* v. *Darbhari Mauton*[4]. A perpetual lease by a trustee is invalid—*Mayandi Chetti* v. *Chokkalinga Pillai*[5]; *Vidyapurna* v. *Vidyanidhi*[6]; *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi*[7]; *Narasimhachari* v. *Gopala Ayyangar.*[8] The giving of the bribe makes the transaction wholly bad. In fact it is in law only an

1. (1891) I.L.R. 15 M. 54.
2. (1896) I.L.R. 22 B. 255.
3. (1899) I.L.R. 27 C. 7 at 10.
4. (1897) 2 C.W.N. 207.
5. (1904) I.L.R. 27 M. 29: (P.C.)
6. (1904) I.L.R. 27 M. 435.
7. (1903) I.L.R. 27 M. 465.
8. (1905) I.L.R 28 M. 391.

authority to redeem. On the question of the rights of Yogakars the judgment (Exh. XIX) operates as *res judicata*. It was a suit between Tachudaya Kaimal as defendant and the Yogakars as plaintiffs. The present plaintiff claims under the Kaimal; the present defendants (mortgagees) plead the title of Yogakars as *jus tertii*.

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C. V. Ananthakrishna Aiyar.—The covenant to redeem the previous mortgage is in itself sufficient consideration to render the suit sustainable. It is not for the previous mortgagee to question consideration when the mortgagor does not question the same—*vide* S. A. 1071 of 1900 (*Bhashyam Aiyangar* and *Moore* JJ.). Again, it is not the business of the melkanomdars to see to the application of the money, kanom and renewal of kanom being a matter in the ordinary course of management in Malabar. The fact that a sum of money is paid to the trustee as a price for his giving the melcharth does not vitiate the transaction, the transaction being in itself a proper one. It may be that the trustee will have to account for the amount so got. But that is a question between the trust and the Kaimal and not for the previous mortgagee. Exh. XIX cannot operate as *res judicata*, as the Cochin Court has no territorial jurisdiction in respect of the present suit. Third parties cannot question consideration — *Govindamal* v. *Gopalachariar* [1]; *Chinnasamy Reddiar* v. *Krishna Reddy*[2]; *Achal Ram* v. *Karim Husain Khan*[3]; *Mussumat Durga Choudhrain* v. *Jawapir Singh Choudhry*[4]. *Shib Chendra Roy* v. *Chendra Narain Mukherjee*[5] was cited for the position that misconstruction of some of the documents in the case is no reason for interference in second appeal.

The Court delivered the following

JUDGMENT:—The suit is to redeem a kanom. The District Munsif dismissed the suit, but the Subordinate Judge, on appeal, gave the plaintiff a decree for redemption on payment of the kanom amount and a certain sum for value of improvements. Against this decree certain of the defendants have filed the present second appeal, and in their appeal memorandum they

1. (1905) 16 M.L.J. 524.
2. (1906) 16 M.L.J. 146.
3. (1905) I.L.R. 27 A. 271.
4. (1890) 17 I. A. 122.
5. (1905) I.L.R. 32 C. 723.

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question the plaintiff's right to redeem and also contend that if it is held that the plaintiff is entitled to redeem he can only do so on payment of a larger sum for improvements than that fixed by the Subordinate Judge. The extra amount claimed for improvements is not given in the Memorandum of Appeal, and Court-fee has been paid on the kanom amount only. The preliminary objection is taken on behalf of the plaintiff-respondent that the extra amount claimed for improvements should be stated and that Court-fee should be paid on that amount also.

The Court-fee payable on a document of any of the kinds specified in the First or Second Schedules of the Court Fees Act is indicated in one or other of those Schedules—*Vide* Ss. 4 and 6 of the Court Fees Act. Article 1 of Schedule I is a general Article indicating the fee payable in respect of a plaint or Memorandum of Appeal not otherwise provided for in the Act, that is, we take it, not falling under any other Article of the First or Second Schedules, as it is those schedules alone which indicate the fee. A perusal of the two schedules will show that a Plaint or Memorandum of Appeal in a redemption suit can only come under Article 1 of Schedule I. Under that Article the Court-fee has to be computed at a stated rate on the amount or value of the subject-matter in dispute, so that before we can ascertain the amount of the fee we must know the value of the subject-matter in dispute. Now a suit for redemption is a suit to recover property mortgaged on payment of what is alleged to be due to the mortgagee. The plaint may show that in addition to the principal money, arrears of interest and compensation for improvements are payable to the mortgagee before the property can be recovered. It may also indicate that the defendant is claiming more under one head or another than the plaintiff admits to be due. Nevertheless S. 7, Cl. 9, of the Court Fees Act lays down that the fee in such a suit shall be computed according to the principal money expressed to be secured by the instrument of mortgage. Hence, in such a suit it must be taken that for the purpose of Article 1, Schedule I, the value of the subject-matter in dispute is the said principal money. From this it seems reasonable to infer that for the purpose of the Court Fees Act the subject-matter in dispute in a redemption suit is the existence of the right to redeem, any question as to the amount payable as the

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condition of redemption being regarded as merely incidental to that right. Let us suppose that such a suit is dismissed, and that the Court dismissing the suit has also recorded a finding that if it were found that the plaintiff had the right to redeem he would have to pay more than the amount alleged by him to be due. The plaintiff on appeal would necessarily urge his right to redeem, and might also contest the finding as to the amount payable. The nature of his suit in appeal would, however, be in no way altered, and there is no sound reason why the subject-matter in dispute in the appeal should, for the purpose of the Court Fees Act, be regarded as different from the subject-matter in dispute in the plaint, *i.e.*, the existence of the right to redeem. How then are we to value that subject-matter in the case of the appeal memorandum? We can only value it as in the case of the plaint, as otherwise there is no provision in the Court Fees Act for valuing it. Suppose again, the plaintiff gets a decree for redemption and the defendant, as in the present case, appeals, contending that the plaintiff has no right to redeem, and in the alternative that if the plaintiff has the right to redeem the amount payble by him is greater than that found by the lower Court. Here again the nature of the suit is in no way changed in appeal. The same questions arise as arose originally and as arise in the appeal by the plaintiff just dealt with above, *viz.*, the existence of the right to redeem, and the amount payable if that right is found to exist. There is no good reason why a defendant appealing on such grounds should be in a worse position than a plaintiff appealing on similar grounds, or why the subject-matter in dispute in the defendant's Memorandum of Appeal should not also for the purpose of the Court Fees Act be taken to be the same as the subject-matter in dispute in the plaint.

In support of the views above expressed we may refer to the case of *Hafiz Ahmad* v. *Sobha Ram*[1]. There it was held that "where an appeal is preferred in a suit for pre-emption on the ground that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute, for the purposes of the Court Fees Act, must be determined as in terms provided in Article (VI) of S. 7 of the Act". It was also held that the

1. (1884) I. L.R. 6 A. 488.

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subject-matter of the dispute in such cases was the right of pre-emption.

We are not concerned here with the case where in the appeal by plaintiff or defendant against a decree in a redemption suit the only question is as to the amount payable. In such a case the existence of the right to redeem cannot be said to be the subject-matter in dispute in the appeal memorandum, for the existence of that right is not disputed. The subject-matter in dispute is a definite amount. The Memorandum of Appeal can only, however, as before come under Article 1 of Schedule I for the purpose of computing the Court-fee, and under that Article the Court-fee is to be computed on the amount in dispute. The result is the same as that arrived at in the *Reference under Court Fees Act*, 1870, reported in I. L. R. 29 M. 367.

We are, therefore, of opinion that the Memorandum of Appeal in the present case is properly stamped.

There is no clear finding as to whether the yogam or the members of the yogam are interested in the suit property. If they are interested in the property within the meaning of Section 85 of the Transfer of Property Act then the suit is clearly bad for non-joinder. We must therefore ask the Subordinate Judge to find on the evidence on record whether the yogam or the members of the yogam are interested in the suit property and if so what is the nature of that interest. We must also ask him to find on the evidence on record whether the kaimal is or is not a trustee.

The findings should be submitted within six weeks from this date and seven days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge submitted findings to the following effect:—

"I find on the 1st issue referred to me that the 'Yogam' has no proprietary interest in Devaswom property; that the only right which they have is the right to take the initiative in getting a Thachutaya Kaimal appointed by the Travancore Maharaja for the Devaswom when there should be a vacancy in that office, to have the accounts of the Devaswom read to them by the accountant of the Thachutaya Kamial in the temple, to perform the ceremonies called Theverseva and Panchasandha in the temple and to see that the spiritual interests of the temple are properly kept

up. They have no interest in the suit property such as entitles them to be made parties to the suit. I find the first issue accordingly in the negative.

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9. On the 2nd issue, I find for the reasons already stated, that the Thachutaya Kaimal is in law the trustee of the Devaswom. The evidence on record shows that he has been all along managing the Devaswom properties as the rightful representative of the Devaswom, without any interference on the part of the 'Yogam'. Though in some documents he is styled the proprietor of the Devaswom properties, the description in those documents taken as a whole simply shows that he is the representative of the Devaswom and, as such, the person in whom the properties of the Devaswom are legally vested. The fact that he is not described as *Uralan* in the documents relating to the Devaswom is of no consequence, because the usages and designations relating to this Devaswom are unique and have nothing in common with those applicable to the ordinary Devaswoms in British Malabar. It has been decided by the Privy Council, that the rights regulating particular public religious institutions in India depend upon their own particular circumstances and have to be deduced from the history of their foundation and immemorial usage. Such being the case, the non-mention of the word *Uralan* in connection with the Thachutaya Kaimal is not by any means a ground for holding that he cannot be regarded as the trustee of this particular religious institution. On the evidence on record, I am of opinion that his true legal position is that of a trustee of the Devaswom. I find accordingly on the 2nd issue that the Kaimal is the trustee of the Devaswom."

The Court delivered the following

JUDGMENT:—The Subordinate Judge has returned findings to the effect that the members of the Yogam have no interest in the property such as entitles them to be made parties to the suit and that the Thachutaya Kaimal is in law the trustee of the Devaswom. These are findings of fact and are binding upon us unless open to some legal objection. It is contended that the findings are vitiated by the facts that the Subordinate Judge has grossly misconstrued certain documents and has wrongly excluded certain evidence as inadmissible. The evidence said to have been wrongly excluded consists of Exs. XI and XVII. The Subordinate Judge did not reject Ex. XI as inadmissible. He merely

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pointed out that it was not free from suspicion which he was certainly entitled to do. Again the Subordinate Judge did not exclude Ex. XVII. He merely criticised the use made of it by the Zillah Judge in Ex. XIX. The documents said to have been misconstrued are certain judgments filed to show instances where the rights in dispute were asserted or denied. He was entitled to weigh the effect of these judgments in the same way as the other evidence in the case and this is all he seems to us to have done. We therefore accept the findings of the Subordinate Judge.

The defendants who appeared in the suit did not contest the genuineness of the plaint melcharth and no issue about its genuineness was framed. As, however, there were some defendants who did not appear, it was necessary to formally prove the melcharth as against them. This necessity was apparently overlooked in the first Court. The Subordinate Judge permitted the formal proof to be given, and in the circumstances we are not prepared to interfere.

The next point taken is that the plaint melcharth was merely a sham and not intended to pass any interest in the property. It does not appear that this precise objection was taken in the Courts below, nor can it be said to be clearly taken in the grounds of appeal here. The main ground of objection taken to the melcharth was that a sum of Rs. 5,000 said to have been paid by the plaintiff to the Kaimal for the melcharth had not in fact been paid. Taking this to be so, the circumstance is not enough ground for holding that no interest was intended to pass. Then it is said that the melcharth is invalid because the Kaimal gave it without receiving the Rs. 5,000 and so acted to the prejudice of the Devaswom. Even if the Rs. 5,000 was not received by the Kaimal there was *prima facie* good consideration for the melcharth as the Subordinate Judge has pointed out. The fact that the defendants were claiming to hold on perpetual tenure was another cogent reason for granting a melcharth.

The remaining point taken is that compensation should have been awarded for 1214 paras of paddy land in place of 310. The Subordinate Judge found that 904 paras had been previously paid for. The finding is one of fact and is open to no legal objection.

The appeal fails and is dismissed with costs. Six months time from this date is allowed for redemption.

The Memorandum of Objections is dismissed with costs.

Sangila v. Maruthamuthu.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sankaran Nair.

Sangila .. .. Appellant* (*2nd Defendant*)

v.

Maruthamuthu and others .. .. Respondents (*Plaintiffs* and *1st Defendant*).

Limitation Act, Art. 139—*Adverse possession—Lease for definite period—Holding over—Starting point.*

Where a lease is for a definite period, and not one from year to year, limitation begins to run against the lessor on the termination of the lease.

Second Appeal from the decree of the District Court of Coimbatore in A. S. No. 127 of 1905 presented against the decree of the Court of the District Munsif of Karur in O. S. No. 581 of 1904.

Plaintiff was a purchaser at Court auction; defendant a lessee under the judgment-debtor under a lease Exh. *D* dated 1883 for a period of 1 year. The District Munsif held that no rent had been paid under this lease ; even if it was a genuine one, twelve years having expired from the expiration of the lease, the suit was barred. On appeal the District Judge held that Exh. *D* was genuine and that non-payment of rent does not render the possession after the expiration of the lease necessarily adverse and that, therefore, plaintiff's claim was not barred. Hence the appeal.

H. Balakrishna Rao for appellant.

K. P. Govinda Menon for respondents.

H. Balakrishna Rao.—This is a case after the Transfer of Property Act. *Adimulam* v. *Pir Rowthan* [1] is therefore distinguishable. Even if otherwise, *Adimulam* v. *Pir Rowthau* [1] is not good law—*Seshammashettathi* v. *Chickaya Hegde* [2] ; *Vadappalli Narasimham* v. *Seetharama Murthy* [3]; *Kankappa* v. *Sheshappa* [4]; *Chaudri* v. *Daji Bhan* [5] ; *Madanmohan Gossain* v. *Kumar Rameswar Malia* [6] ; see also S. 116, Transfer of Property Act.

K. P. Govinda Menon—relied upon *Adimulam* v. *Pir Rowthan* [1]; *Srinivasa* v. *Muthusami* [7] ; *Ittappan* v. *Manavikrama* [8]

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* S. A. No, 812 of 1906. 1st December 1909.

1. (1885) I.L.R. 8 M. 424.
2. (1902) I.L.R. 25 M. 507.
3. (1907) I.L.R. 31 M. 163.
4. (1897) I.L.R. 22 B. 893.
5. (1900) I.L.R. 24 B. 504.
6. (1907) 7 C. L.J. 615.
7. (1900) I.L.R. 24 M. 251.
8. (1897) I.L.R. 21 M. 153.

angila v. arutha-authu.

The Court delivered the following

JUDGMENT:—This is a lease for a term of 12 months only and under S. 111, Transfer of Property Act, was determined at the expiry of the term. It is not suggested that the tenancy was renewed under S. 116 of the Act; and we think the suit is barred under Article 139 of the 2nd schedule of the Limitation Act of 1877. The case to which the District Judge refers was a case of tenancy from year to year determinable by notice.

We reverse the decree of the District Judge and restore that of the District Munsif with costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Krishna Baipadithaya .. Appellant* (*Prisoner*).

In re Krishna ipadithaya.

Penal Code, S. 211—"Instituting criminal proceedings"—Statement under S. 162, Cr. P. C.

A statement made to the Police under S. 162, Cr. P. C., after the law has been set in motion and by which the prosecution cannot be said to have been instititutcd, cannot be made the basis of a prosecution for an offence under S. 211, I. P. C.

Appeal from the sentence of the Court of Session of South Canara Division in Case No. 10 of the Calendar for 1909.

The necessary facts appear in the judgment.

K. Narayana Rao and *B. Sitarama Rao* for appellant.

The Public Prosecutor (*C.F. Napier*) for the Crown.

K. Narayana Rao:—The so called complaint is a record of the examination of the accused by the Police officer in the course of his investigation. The Criminal Law had already been set in motion by the information given to the Village Magistrate who passed it on to the Police officer. Under these circumstances conviction for an offence under S. 211, I.P.C., is clearly unsustainable—*Chinna Ramanna Gowd* v. *Emperor*[1]; *The Sessions Judge of Tinnevelly Division* v. *Sivan Chetty*[2] (per *Sankaran Nair* J;) and *In re Penchalagadu*[3] (Cr. R. C. 515 of 1902.)

The Public Prosecutor (*C. F. Napier*)—relied upon *Emperor* v. *Jamalagaddu Venkatarayudu*[4] as holding a contrary view. He also submitted that whether an information is information under S. 154, or otherwise, is to be determined by reference to the

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* Cr. A. 500 of 1909. 25th October 1909.

1. (1908) I.L.R. 31 M. 506.
2. (1909) I.L.R. 32 M. 258.
3. (1902) Weir's Cr. Rulings Vol. I. p. 193.
4. (1905) I.L.R. 28 M. 565.

intention of the party to be inferred from the circumstances of the case—*Mallappa Reddi* v. *Emperor*[1]. The fact that a separate statement was prepared and was signed by the accused shows his *animus*. The mere fact that the statement begins by saying that "Krishna Baipadithaya being examined says as follows" cannot make it any the less a complaint. There is another distinguishing feature in this case. The information to the Village Magistrate was simply that a son of Vishnu Bodminnaya committed the offence, not against any particular person, though the Police officer seems to have taken it to mean the complainant.

K. Narayana Rao—submitted that *Emperor* v. *Jamlagaddu Venkatarayudu*[2] was distinguishable on the facts. If it was not, he would submit with *Sankaran Nair* J., that the learned Judges in that case were wrong.

The Court delivered the following

JUDGMENT :—On the morning of the 22nd March 1908, the house of the accused was burnt down. At 4. P.M. that day Prosecution Witness No. 4 reported to the Potel—Defence Witness No. 9—that Prosecution Witness no 1 had set fire to the house. The Potel reported this to the Police in Exhibit *D* and asked them to come and investigate. Prosecution Witness No. 10, the Constable who received the report, went to the scene on the 23rd March, and after questioning the accused, his wife and children, arrested Prosecution Witness No. 1. What the accused said was embodied in the Constable's Case Diary: Exhibit *F*. It was also made the subject of a separate statement, Exhibit *E*, which the accused signed. Prosecution Witness No. 1 was tried for arson but was discharged. Proceedings were then taken against the accused, and the charge under S. 211, I. P. C., on which he has been tried and convicted is that with intent to cause injury to P. W. No. 1 he instituted criminal proceedings before the Constable, Prosecution Witness No. 10, charging Prosecution Witness No. 1, with having set fire to his house knowing that there was no just or lawful ground for his action. Objection is taken that the statement made by the accused to the Constable was a statement made under S. 162, Cr. P. C., and that such a statement is not a complaint or charge and cannot be made the basis of a prosecution for an offence under S. 211, I. P.C ;

1. (1904) I. L. R. 27 M. 127.
2. (1905) I. L. R. 28 M. 565.

In re Krishna Upadithaya.

that the statement made by the accused to the Constable though reduced to writing and signed by him, was a statement made under S. 162, Cr. P. C., and not under S. 154, Cr. P.C. There can be no doubt on the facts of this case. In *Chinna Ramanna Gowd* v. *Emperor*[1] it was held that a statement made under S. 162 Cr.P.C., cannot be made the basis of a prosecution for an offence under S. 211, I. P. C. When the accused made his statement the law had already been set in motion against Prosecution Witness No. 1, and the proceedings cannot be said to have been instituted by the statement made by the accused to the Constable. We set aside the conviction and acquit the accused. His bail bond is discharged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Miller.

Katankandi Koma *alias* Koyammotti .. Appellant* (*3rd Defendant*)

v.

Thamburam Kandi Siva Sankaran and Katankandi others .. .. .. Respondents (*Plaintiff*, *1st* and *2nd Defendants*).

Katankandi Koma v. Siva Sankaran

Malabar Law—Gift to female and her children—Incidents of tarwad property—Contract to sell by some of several owners—Specific performance.

Where a gift of property is made to a Malabar female and her children, governed by the Malabar Law, the donees take it with the incidents of tarwad property, *i.e.*, the property is not merely impartible but the donees though not forming a tarwad with a karnavan of its own have also the same interest in the property that they would have had if they had formed a separate tarwad; *i.e.*, every child of the female donees obtains an interest in it at his or her birth.

A suit for specific performance of a contract to sell lands belonging to several jointly cannot be maintained if the contract be by some only.

Appeal from the decree of the District Court of North Malabar in O. S. No. 11 of 1907.

The Advocate General (*P. S. Sivasami Aiyar*) and *K. P. Govinda Menon* for appellants.

J. L. Rozario for the 1st respondent.

The Court delivered the following

JUDGMENT :—We cannot accept the evidence as establishing the position for which the plaintiff contends, that Chiratha the purchaser named in Exhibit *II* had no interest

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* A. 204 of 1907. 28th August 1909.

1. (1908) I. L. R. 31 M 1506.

Kabankandi Koma v. Siva Sankaran

in the paramba purchased. Exhibit *K* is most untrustworthy as a statement of title because it was made in a suit in which it was the object of the present 2nd defendant to defeat the claims of a mortgagee from her mother and to do this she alleged, if indeed she did allege, that her mother had no interest. The document is not entirely clear. We are not sure that the 2nd defendant did not intend to admit her mother's interest, and merely to allege that she had no right to alienate without her (the 2nd defendant's) consent.

The witness K. Kannan no doubt says that the purchase of the paramba was made at his mother's suggestion for the 1st and 2nd defendants, but there is no explanation why, if Kanaran intended his wife to have no interest, he made the purchase in her name. It is quite possible that he did not, when it came to the point, accept the suggestion of Kannan's mother in its entirety.

Exhibit *II* shews clearly the position taken up by the 2nd defendant in 1900. She then alleged that the gift was to the whole family, *i.e.*, to herself, her mother and all the children of both, including therefore the 1st defendant though he is not mentioned by name.

It is very doubtful whether this is really consistent with the allegations in Exhibit *K*: but if it is, it seems to be much more likely to be what the petitioner believed to be true—because it does admit some interest in Chiratha, while the object of the proceedings was to prevent the sale of the property as Chiratha's assets.

From Exhibit XV it appears that the contest then in which the 2nd defendant joined, was on the question whether the property belonged to Chiratha *alone* or *to her and her children*, and not whether it belonged to *her* or *to her children.* If there were really any foundation for the present claim of the plaintiff, the 2nd defendant would surely have made it in those proceedings.

The District Judge has given too tittle weight to the fact that Exhibit *III* stands in Chiratha's name. He should have demanded an explanation of that circumstance from those who alleged that she had no interest, but there is none forthcoming.

Now the District Judge says that both sides are agreed that the property was not bought for Chiratha's sole benefit and we must, therefore, take it that it formed in reality a gift to her and her children. The donees therefore took it with the incidents of Tarwad property (*Kunhacha Umma* v. *Kutti Mammi Hajee*[1])

1. (1892) I. L. R. 16 M. 201.

Kabankandi Koma v. Siva Sankaran

that is to say, as we understand it, not merely that the property was impartible but that the donees, though not forming a Tarwad with a Karnavan of its own (*Kortoh AmmanKutti* v. *Perungottil Appu Nambiar*[2]), had the same interests in the paramba that they would have had if they had formed a separate Tarwad, and consequently that every child of the female donees obtained an interest in it at his or her birth, and the children of the 2nd defendant are owners of the paramba just as much as the 1st and 2nd defendants.

This being so the 1st and 2nd defendants had no power to sell to the plaintiff, and the plaintiff cannot sue for specific performance of their agreement to do so.

It becomes, in these circumstances, unnecessary to decide whether 3rd defendant had or had not notice of the agreement.

The appeal is allowed, and the plaintiff's suit is dismissed with costs in both Courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Nayana Naickan .. .. .. Appellant* (*Plff.-Counter-Petitioners*).

v.

Hajarat Kibuliai Syed Gulam Ghowse Sha Sait Kadiri .. .. .. Defendant (*Petitioner*).

Nayana Naickan v. Syed Gulam.

C. P. C. (Act XIV of 1882) *Ss.* 642, 244—*Appeal—Powers of Court.*

An order under S. 642 dismissing a petition by a judgment-debtor claiming exemption from arrest is one relating to the execution of the decree and an appeal lies therefrom.

A Judge who issues a warrant for the arrest of a judgment-debtor has surely power to issue orders for his release if he be found to have been illegally arrested at a time when he was exempt from arrest.

Appeal from the decree of the District Court of Tanjore in A. S. No. 139 of 1907 presented against the order of the Court of the District Munsif of Tanjore in E. A. No. 1320 of 1906 in O. S. No. 59 of 1900.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for appellant.

S. Srinivasa Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The first contention is that no appeal lay to the present Judge against the order of the District Munsif. The

*C.M.S.A. A. A. O. No. 4 of 1908. 18th January 1909.

2. (1906) I. L. R. 29 M. 324.

Nayana Naickan v. Syed Gulam.

respondent, at the instance of the appellant, the decree-holder, was arrested in execution under a warrant issued by the District Munsif. He petitioned the District Munsif for his release, pleading exemption from arrest under S. 642, Civil Procedure Code. The District Munsif dismissed the petition on the ground that the right to exemption was not proved. The District Munsif's order was clearly an order under S. 244, Civil Procedure Code, as it determined a question between the parties to the decree relating to the execution of the decree. An appeal therefrom lay to the District Judge. The remaining contention pressed is that the District Munsif had no jurisdiction to entertain the petition for exemption.

The District Munsif who had power to issue a warrant for the respondent's arrest had surely power to issue orders for his release if he was found to have been illegally arrested at a time when he was exempt from arrest. Every warrant of arrest must be considered to be issued subject to the provisions of S. 642, Civil Procedure Code.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller.

Velu Tayi Ammal and others .. .. Petitioners* (*Counter-Petitioners*)

v.

B. Chidambara Pillai .. .. Respondent (*Petitioner*).

Tayi Ammal v. Chidambara Pillai.

Cr. P. C., Ss. 437, 119—Order for fresh inquiry in cases disposed of under S. 119—No jurisdiction—"Discharged" in S. 437, meaning of—Cr.P.C.—Charge—Discharge, meaning of.

The jurisdiction given under S. 437, Cr. P. C., to order further inquiry cannot be applied to cases under Ch. VIII, Cr. P.C., at any rate, where before making an order under S. 119, Cr.P. C., the Magistrate has called on the person into whose conduct the inquiry is made, to establish his defence.

Quære:—Whether S. 437 will apply to cases disposed of under S. 119, Cr.P.C., before calling on the person to establish his defence.

The word "discharged" in S. 437 is equivalent to "discharged within the meaning of Ss. 209. 253, 259, Cr. P. C." The meaning of the word "discharge" in S. 119, Cr. P. C., is non-technical and merely means permission to depart.

The word "charge" as applied to offences is used in two senses in the Code. In Ch. XIX and in Ss. 210 and 254, it is the formal statement of the case which the accused has to meet; and in S. 253 it is used in the popular sense of "accusation."

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* Cr. R. C. No. 104 of 1909. 24th August 1909.
Cr. R. P. No. 75 of 1909.

Tayi Ammal v. Chidambara Pillai.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Additional District Magistrate of Madura in Cr P. C. No. 34 of 190 preferred against the order of the Court of the Sub-Divisional Magistrate, Dindigul, in M. C. No. 13 of 1908.

T. Rangachariar and *K. Parthasarathi Aiyangar* for petitioners.

The Public Prosecutor (*C. F. Napier*) contra.

T. Subrahmania Aiyar and *P. S. Subramania Aiyar* for respondent.

The Court made the following

ORDER :—The only cases, so far as I know, in which a Magistrate is authorised by the Criminal Procedure Code to discharge a person whose conduct is under inquiry before him are those provided for in Ss. 209, 253, 259, 119 and 484 of the Code.

I am not concerned with S. 484, but it might be difficult, I think, to hold that S. 437 is applicable to the case of a person discharged under that section.

The discharge under Ss. 202, 253 and 259 is made before the accused is called on to establish his defence before a Court which is competent to try and determine the case and in cases in which a charge must be drawn up before any order can be made against the accused or penalty imposed upon him. Section 437 undoubtedly applies to disposals under Ss. 253 and 259, and may be applicable to a disposal under section 209 also. The discharge uder S. 119 is a different matter. It may be made after the defence has been fully heard; no charge need be drawn up before the case is disposed of under S. 118; and if the accused (as I call him for convenience) is in custody there is no discharge but an order of release.

The question is:—Does S.437 apply to this case? I think not. For the reasons which I am about to give, I think I shall give effect to the real intention of the Legislature if I read the word 'discharged' in S. 437 as equivalent to 'discharged within the meaning of Ss. 209, 253 and 259 of the Code.' It is clear to me that the Legislature would not have made a distinction between an order of release and a discharge if they had not intended that the two should be regarded as different things. They have not made any such distinction in Ss 209, 253 and 259. If then these two things are different, it is impossible, I think, to apply S. 437 to the 'discharge' The Code does not authorise its

application to a release which is not a discharge, and it would be absurd to make the jurisdiction under S. 437 depend upon the question whether or not the accused (I use the expression again for convenience only) was in custody at the time of the disposal of the case by the Magistrate. I am not prepared to attribute such an absurdity to the framers of the Code, especially when, as here, it is easy by giving a non-technical sense to the word 'discharge' to bring the procedure in regard to inquiries under Chapter VIII into harmony with the provisions of the Code in analogous cases.

There is no difficulty in holding that the 'discharge' under S. 119 is merely a 'permission to depart.' The word 'charge' as applied to offences is used in two senses in the Code. In Chapter XIX and in Ss. 210 and 254 it is the formal statement of the case which the accused has to meet; in S. 253 it is used in the popular sense of 'accusation.'

Similary 'discharge' may have two meanings, and S. 119 indicates that its meaning in that section is non-technical. The record is completed by the entry required by the section; the Magistrate then permits "the person in respect of whom the inquiry is made" to depart if he is not in custody, and, if he is in custody, directs the custodian to give the necessary permission.

Now this may be done after the Magistrate has been satisfied, after hearing evidence for the defence, that the execution of a bond is unnecessary, and it seems to me that it would be wrong in principle to permit a "further inquiry" in such a case. The inquiry is into conduct and so is analogous to an inquiry into an offence; and it is to be made in the manner prescribed for conducting the trial of an offence [S. 117 (2)].

When a person accused of an offence has, by evidence adduced on his behalf, satisfied a Magistrate competent to try him and punish him if he is guilty, that he ought not to be convicted, the Code does not contemplate a 'further inquiry' by order of a superior Magistrate. The High Court alone can interfere in that case.

I am unable to see any reason why a difference should be made in the analogous case of an inquiry under Chapter VIII. When, after hearing the defence evidence, the Magistrate is satisfied that the execution of a bond is unnecessary, a further inquiry into the case is, to my mind, an inappropriate remedy if the Magistrate is thought to be wrong.

ayi Ammal v. hidamtara Pillai.

It may be that the law does not prohibit the taking of new proceedings under the chapter on the same materials, but this is a different matter on which I need not express an opinion.

I am thus fortified in the conclusion at which I had arrived by the process of *reductio ad absurdum*, by a consideration of the matter on the general principles of the Code, and I have no doubt that the Legislature did not intend and that I ought not to hold, that the jurisdiction given by S. 437 should be applied to cases under Chapter VIII, at any rate where, before making an order under S. 119, the Magistrate has called on the person, into whose conduct the inquiry is made, to establish his defence. It might, perhaps, be possible by analogy to apply S. 437 to disposal under S. 119, made in circumstances resembling those in which a discharge is made under S. 253, but the case before me is not such a case. The defence has been heard, and the Magistrate is satisfied that a bond is unnecessary.

I must, therefore, set aside the order of the District Magistrate as made without jurisdiction.

I am asked on behalf of the original complainant (so to style him) to interfere unner S. 439, but the Public Prosecutor does not support this request, and I agree with him that it is unnecessary to order a *de novo* inquiry. There is clearly nothing to prevent the taking of fresh action under Chapter VIII if the conduct of the petitioners, perhaps, is such as to render that course necessary or desirable.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Venkata Reddi .. Petitioner* (*Respondent* in *Ap.* 43 of 1907 & *Petr. in C. M. P.* 1253 of 1909 *on the file ot this Court.*)

v.

Obli Reddi and another .. Respondents. (*Appts. in App.* 43 of 1907; & *Respts. in C. M. P.* 1253 of 1909.)

Venkata Reddi v. Obli Reddi

C. P. C. V. of 1908—*O.* 45 *r.* (13) (2) (*c*)—"*Stay of execution of the decree appealed from*"—*Privy Council appeal—Stay of execution.*

Until the admisssion of the appeal, no decree can be said to have been "appealed from"; and, consequently, a court can only stay execution under O. 45, R. 13 (2) (*c*) after the grant of a certificate for the admission of the appeal.

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*C. M. P. 1254 of 1909. 19th August, 1909.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing stay of excution of the decree of the High Court in Appeal 43 of 1907 presented against the decree of the District Court of North Arcot in O. S. No. 30 of 1904, pending disposal of the appeal to His Majesty in Council against the said decree.

K. Ramanatha Shenai for petitioner.

M. B. Doraisawmi Aiyangar for respondents.

M. B. Doraisawmi Aiyangar took a preliminary objection that stay of execution could not be directed before the certificate is granted and relied upon *S. M. Bibijarao Kumari* v. *Gopichand Bothra* [1]. He submitted that whatever the scope for argument under the old S. 608 C.P.C., under the wording of Order xlv, R. 13, execution could not be stayed before the grant of a certificate.

K. R. Shenoi contended on the authority of *Dame Janbai* v. *Sale Mahomed*[2] that the Court could stay even before.

The Court made following

ORDER:—We have no doubt that the Court can only stay execution under Order 45, Rule 13 (2) (*c*) after the grant of a certificate for the admission of the appeal. Rule 13 (2) (*c*) refers to stay of execution of the decree appealed from. Until the admission of the appeal no decree can be said to have been appealed from. This was the view taken in *S. M. Bibijarao Kumari* v. *Gopichand Bothra*,[1] differing from *Dame Janbai* v. *Sale Mahomed.*[2]

The petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph S. Benson, Officating Chief Justice, and Mr. Justice Sankaran Nair.

Kumarasami Chetty .. Appellant* (*Plaintiff*)

Poosari Sakka Naik and another .. Respondents (*Defendants*).

Practice—Pleadings—Inconsistent claims—Claim to possession first as purchaser and then as mortgagee.

Where plaintiff alleged title as purchaser and that is found against, he cannot afterwards claim to be entitled to possession as usufractuary mortgagee before the purchase, the two claims being inconsistent with each other.

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*S. A. No. 467 of 1906. 7th October, 1909.

1 (1900) 5 C. W.N. 562.

2. (1894) I. L. R. 19 B. 10.

imarasami Chetty v. akka Naik.

Second Appeal from the decree of the Subordinate Judge's Court of Tuticorin in A. S. No. 358 of 1905 presented against the decree of the Court of the District Munsif of Satur in O. S. No. 129 of 1904.

Suit for possession on the allegations that the plaintiff was owner, having bought the property from 1st defendant's son who is not a party and that the plaintiff was dispossessed. Defendants set up title in themselves and denied plaintiff's possession.

The other facts and contentions appear in the Judgment.

Joseph Satya Nadar for appellant

N. Rajagopalachari for *S. Srinivasa Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff alleged he was a mortgagee of the plaint land which was Service Inam, under the 1st defendant from 1892; that it was resumed by the Zamindar in 1898, who granted it to the 1st defendant's son in 1901, who sold it to the plaintiff who remained in possession under the sale deed. It is found that the land belongs to the 1st defendant; that the plaintiff's vendor never acquired any title to convey to the plaintiff. In second appeal it is contended that as the plaintiff is a mortgagee under the 1st defendant who is now found to be the owner, he is entitled to remain in possession as mortgagee. The plaintiff's claim in the plaint was not based on his mortgage right under the 1st defendant. It was inconsistent with it as he alleged that the land became the exclusive property of the 1st defendant's son who sold it to him. He could have become such owner only after the land was freed from the mortgage. He is not, therefore, entitled to any relief for which he has not prayed and which is inconsistent with the title alleged by him.

We, therefore, dismiss this second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

Paramasawmi Iyengar .. Appellant* (*Plaintiff*)

v.

Pusala Thevan and others .. Respondents (*Defendants*).

amasawmi v. Pusala Thevan.

Madras Acts—Act VIII of 1865—Rent Recovery Act, S. 11—Usage of enhancing rent for dry land converted into wet at tenant's expense—Illegal usage.

A landlord is entitled to raise the rent only if the improvement is effected at his own expense or at the expense of the Government; and in either case, only with the

* S. A. Nos. 921 to 952 of 1908, 8th October, 1909.

sanction of the Collector. Where the rent payable is in fact higher, the case falls under S. 11 of the Rent Recovery Act, VIII of 1865. A usage to charge assessment at the wet rate on account of the tenants converting land from dry to wet or any other improvement effected at the tenant's expense is illegal.

Paramasawmy v. Pusala Thevan.

Second Appeals from the decrees of the District Court of Madura in A. S. Nos. 531 to 560, 647 and 648 of 1907 presented against the decision of the Court of the Deputy Collector of Madura in Summary Suits Nos. 102 &c. of 1906, respectively.

S. Srinivasa Aiyangar and *N. R. K. Thathachariar* for appellant.

K. N. Aiya for respondents.

The Court delivered the following

JUDGMENT :—The question is whether the plaintiff is entitled to claim wet assessment on dry lands cultivated with wet crops, whatever may be the source of irrigation. The Judge has found that there was no contract, express or implied, to pay rent at the rate claimed, and nothing has been urged before us to show that he was wrong. It was then argued that the plaintiff is entitled to prove that he is entitled to do so by custom. The Deputy Collector and the District Judge held that the custom is invalid as it is opposed to the provisions of Act VIII of 1865. We agree. We are unable to agree with the appellant's pleader that in such cases the landlord does not raise the rent. Where the rent payable is in fact higher, the case falls within the proviso to S. 11, Rent Recovery Act. A usage to charge assesment at the wet rate on account of the tenant's converting land from dry to wet or any other improvements effected at the tenant's expense is illegal. See *Fischer* v. *Kamakshi Pillai*[1]. The ground of decision is that a landlord is entitled to raise a rent only if the improvement is effected at his own expense or at the expense of Government, and in either case only with the sanction of the Collector. We hold for the same reason, that the custom set up in this case is illegal and that the condition in the patta which enables the landlord to receive a higher rent when the wet crop is cultivated with water brought into the fields at the tenant's expense cannot, therefore, be enforced. The second appeals, Nos. 921 to 925, 928 to 932, 934, 936, 937, 940 to 944, 946, 948, 951 and 952 of 1908 are accordingly dismissed with costs and the others without costs.

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1. (1897) I. L. R. 21 M. 136.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

V. Sesha Aiyar .. Appellant*
v. (*1st Defendant*)

Bhavaji Mangal Doss Jee Varu
and another .. Respondents
(*Plaintiff* and
2nd Defendant.)

Sesha Aiyar v. Mangal Doss Jee.

Negotiable Instruments Act, Ss. 7, 8, 43—Plea that maker was a mere name lender—"Consideration"—Meaning of—Contract Act, S. 2—"At the request of the promisor."

Consideration means an act, abstinence or promise made by the promisee or some other person at the desire of the promisor; and the mere admission by the defendant in a suit on a negotiable instrument that he was a name lender for the real obligor, without more (*i.e.* without proof of a request by the maker to advance money to the real obligor), will not make the note one supported by consideration so far as the maker is concerned.

Abdur Rahim J.:—*Semble.*—In a suit upon a negotiable instrument, it is open to the maker of the note to plead that he signed the promissory note as a mere "name lender," *i.e.*, that it was agreed that he was not to be sued upon it. [*Subba Narayan v. Ramasawmi Aiyar*[1] distinguished.]

Second Appeal from the decree of the Subordinate Judge's Court of North Arcot in A. S. No. 222 of 1903 presented against the decree of the Court of the District Munsif of Tirupati in O. S. No. 1005 of 1901.

L. A. Govindaraghava Aiyar for appellant.

S. Gopalasami Aiyangar for respondents.

The Court delivered the following

JUDGMENTS :—*Munro* J.—The suit was on a promissory note, execution of which was admitted by the appellant who, however, contended that he received no consideration for it. The Subordinate Judge, on appeal, held that on the appellant's own admission the plaintiff was entitled to a decree. Now what the appellant admitted is contained in paragraph 3 of his written statement. He there says that the plaintiff and one Narayana Iyer, Police Inspector, had money dealings; that they were unwilling that any written documents should pass between them because of the official position of Narayana Iyer, and that at the request of both of them he executed the suit note as a mere name-lender. The Subordinate Judge on this observed

* S. A. 1011 of 1906. 29th October 1909.

1. (1906) I. L. R. 30 M. 88.

that the 1st defendant was liable, because, although the consideration did not pass to him it did pass to his friend. Now the definition of 'consideration' is to be found in S. 2 (*d*) of the Indian Contract Act, and that definition shews that consideration means an act, abstinence or promise made by the promisee or some other person at the desire of the promisor. The appellant does not admit that the promisee did anything at his request, and on his mere admission it cannot be held, so far as he is concerned, that there was consideration for the note. I would, therefore, reverse the decree of the Subordinate Judge and remand the appeal for disposal on the merits. Costs will abide the result.

Abdur Rahim J.—To a suit on a promissory note the defendant-appellant's answer was that he executed the note as a 'mere name lender' for a friend of his to whom the plaintiff, the payee mentioned in the note, advanced a certain sum of money and the defendant so executed the promissory note at the request made to him by his friend and the plaintiff. The Subordinate Judge held that this was no defence at all, and the learned pleader for the respondent has cited *Subba Narayan Vathiyar* v. *Ramasawmi Iyer*[1] in support of the judgment of the lower appellate Court. In that case, however, the only point decided was that in a suit instituted on a negotiable instrument by a payee named therein or the indorsee, it is not open to the defendant to plead that such payee or indorsee was a mere benamidar, and the learned Judges based their ruling on Ss. 8 and 78 of the Negotiable Instruments Act, which, in their opinion, merely embody the law merchant governing Negotiable Instruments Act as enunciated in certain English decisions. But Sections 8 and 78 have no application to the present question, nor have we been referred to any English authority in support of the respondent's contention. On the other hand S. 43 of the Act in so many words permits the defendant to resist the suit on the ground that the note was made without consideration. It is true that the sum mentioned in the note was paid by the plaintiff to a friend of the defendant's, but as pointed out by the learned vakil for the defendant who is the appellant before us there is no admission in the written statement that the money was advanced

1. (1906) I.L.R. 30 M. 88.

Sesha Aiyar v. Mangal Doss Jee.

at the request of the defendant. That being so, it could not be said that there was consideration for the promissory note so far as the defendant is concerned, and this is made clear by the definition as given in S. 2 of the Indian Contract Act. Justice obviously requires that a plea like this, if made out, should prevail, and no rights of any transferees for consideration being involved, it does not seem to me that any principle of law merchant relating to Negotiable Instruments requires that such a plea should be barred. It also appears to me that it is open to the defendant to show that he signed the promissory note as a mere "name-lender" which, I take it, means that it was agreed that he was not to be sued upon it.

But this point has not been raised before us by the learned vakil for the appellant, and it is, therefore, not necessary to express a decided opinion upon it.

I agree in the order proposed by my learned brother.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Benson [and Mr. Justice Sankaran Nair.*]

Sri Venkatachellapathy Sabyya Vyavasaya Co. by its President S. R. Venkatramier .. Petitioner † in all C. R. P.'s. (*Plaintiff in all S. C. S's.*)

v.

Kanakasabapathi Pillai (Dharmum) and others .. Respondents (*Defendants*).

Sri Venkatachellapathy Vyavasaya Co. v. Kanakasabapathi Pillai Dharmum.

Provincial Small Cause Courts Act, Art. 18—Suit relating to a trust—Suit for recovery of subscription due from trust.

The plaintiff company sued, by its President, defendants 1 to 4 (the first defendant being described as a *Dharmam* and the rest as its trustees) for recovery of subscription due to the plaintiff company by the trust as a member thereof and prayed for a decree to the plaintiff company from the 1st defendant—the *Dharmam*—and alternatively, for a decree against defendants 2 to 4 in case the trust is found not liable.

Held per *Chief Justice* and *Sankaran Nair* J., *Benson* J. *dissentiente*) that the suit is not one relating to a trust within the meaning of Art. 18 of the Provincial Small Cause Courts Act and is, consequently, cognizable by a Court of Small Causes.

Petitions under S. 25 of Act IX of 1887, praying the High Court to revise the orders of the Subordinate Judge's Court of Tuticorin, in S. C. Ss. Nos. 491 to 495, 1139 and 1140 of 1908.

* [The case was first heard by the *Chief Justice* and *Benson* J. and on a difference of opinion between the learned Judges was heard by Mr. Justice *Sankaran Nair*, sitting as a Single Judge.—ED.]

† C. R. P. 751 to 757 of 1908. 10th December 1909

Sri Venkata chellapathy Vyavasaya Co. v. Kanakasabapathi Pillai Dharmum.

This is a suit by an Agricultural Association for recovery of subscriptions due from the 1st defendant, a member, which was described as a Dharmam or Trust, the prayer being to recover it from the trust properties, and in the alternative to recover the amount from the other defendants who as trustees joined the plaintiff association. The Sub-Judge held the suit to be not of a Small Cause nature on the ground that it related to a trust.

[The petition first came on for hearing before *Sankaran Nair*, J. and he referred it to a Division Bench; the case again came on for hearing before the *Chief Justice* and *Benson* J., where the following arguments were advanced.—ED.]

A. S. Balasubrahmania Aiyar for petitioner.

S. Srinivasa Aiyar for respondents.

A. S. Balasubrahmania Aiyar:—The mere fact that a decree is prayed for against the trust cannot make the suit one "relating to a trust" within the meaning of Cl. 18 of Act XXV of 1887. *Sundaralingam Chetty* v. *Mariyappa Chetty*[1] is very near the point. Otherwise on every occasion an original suit will have to be filed for recovery of subscription and there will be an appeal and second appeal. *Subrahmania Aiyar* v. *Doraiswami*[2] gives the test to see whether a suit relates to a trust.

S. Srinivasa Aiyar:—The question depends upon the meaning of the words "relating to." They mean "standing in some relation to; having bearing or concern; pertaining to." The words are very wide. They cannot be whittled down to something like "relating to the administration of the trust." The words "relating to the trust" will comprise not only "relating to the trust property" but also the "administration of the trust." The corresponding words in the Presidency Small Cause Courts Act are "to enforce a trust." Here the words are much wider. There is every reason why such suits should be tried as regular suits. The questions that may very often arise in such cases where the trust property is sought to be made liable are—(1) the competency of the trustee; (2) whether the transaction is such as will bind the trust. The possibility of regular suits for each subscription need not frighten us; for once these issues are tried and decided, every subsequent suit, even though it may

1. (1902) I.L.R. 26 M. 200. 2. (1902) I.L.R. 26 M. 368.

Sri Venkatachellapathy Vyavasaya Co. v. Kanakasabapathi Pillai Dharmum.

The Chief Justice.

bear the name of an original suit will be as summary as possible, the only issue then requiring trial being the factum of payment. *Sundarlingam Chetty* v. *Mariyappa Chetty*[1] and *Subramanya Iyer* v. *Doraisawmy Tewar*[2] do not touch this case.

The Court delivered the following

JUDGMENTS:—*The Chief Justice* (C. R. P. 751 of 1908)—This is a petition under S. 25 of the Provincial Small Cause Courts Act, 1887, against the decision of the Subordinate Judge of Tuticorin on the preliminary objection that the suit being one "relating to a trust" within the meaning of Art. 18 of the Second Schedule to the Act, it was not triable on the Small Cause side of the Court. The Subordinate Judge allowed the preliminary objection.

The suit is by a limited liability company brought in the name of the "President" of the company, for "subscriptions" alleged to be due to the company under its articles of association and rules, from defendants Nos. 2 to 4 as members of the company.

Defendants Nos. 2 to 4 are described in the plaint as the trustees of a "Dharmam" or charitable trust, the trust itself being the 1st defendant. The claim is made against the defendants Nos. 2 to 4, as trustees, and alternatively in their private capacity. The plaintiff asks for payment of the amount claimed from the 1st defendant, *i.e.*, apparently out of the trust property, and alternatively by defendants Nos. 2 to 4 personally. The 2nd defendant pleads that the trust funds are in the possession of defendants Nos. 3 and 4 and that they are liable.. He denies his personal liability. The 3rd defendant pleads, *inter alia*, that he and defendants 2 and 4 are not the trustees of the "Dharmam" and that the properties of the "Dharmam" are managed by the entire body of the caste of which defendants Nos. 2 to 4 are members. The 4th defendant pleads, *inter alia*, that defendants Nos. 2 to 4 are not the sole trustees and that the trust property is managed by the whole caste.

It seems to me that the suit is one relating to the liability of the defendants, either as trustees, or in their personal capacity, to pay to the company the "subscriptions" alleged to be due from them as "members," and that it is not a "suit relating to a trust" within the meaning of the words of the 2nd Schedule of

1. (1902) I.L.R. 26 M. 200. 2. (1902) I.L.R. 26 M. 368.

Sri Venkatachellapathy Vyavasaya Co. v. Kanakasabapathi Pillai Dharmum.

Chief Justice.

the Act. In my opinion the fact, that in order to decide the question raised in the suit it may be necessary to determine whether the trust property is liable, does not make the suit one " relating to a trust." The defendants are not sued because they are trustees, but because, as the plaintiff alleges, they are liable under the articles of association of the company to pay the subscriptions claimed. It may be that, as a result of a decision in this suit questions may arise for determination as between the defendants Nos. 2 to 4 and their *cestui que trustent* (if any) but this, in my opinion, does not make the suit one " relating to a trust " as between the plaintiff and defendants Nos. 2 to 4.

The words "suit relating to trust" are, no doubt, wider than the words in the corresponding enactment in the Presidency Small Cause Courts Act, 1882, which are "suits to enforce a trust" but the introduction of the words " including a suit, etc.," in Article 18 of the 2nd Schedule to the Provincial Small Cause Courts Act, seems to me to indicate that the words " suits relating to a trust " should be construed in a restricted sense.

If the words " suit relating to a trust " are susceptible of the general interpretation which the Subordinate Judge has placed upon them, the later words of the paragraph "including, etc.," would seem to be unnecessary.

I think the view I have indicated is borne out by the authorities (see *Sundaralingam Chetty & another* v. *Mariyappa Chetty & another*[1]). In *Krishnyyyar* v. *Sundararaja Iyengar*[2], where it was held the suit was not cognisable by a Small Cause Court, the suit was by a trustee against his prodecessor in office for loss to the *cestui que trust* by the defendant's negligence, *i.e.*, breach of trust. In *M. V. Subramania Iyer* v. *Pandi Doraiswamy Tevar & others*[3], where it was held the suit was not cognisable, the plaintiff's cause of action, if any, was to enforce the performance of the trust in so far as the trust related to him.

I think the Small Cause Court had jurisdiction, that the order of the Subordinate Judge on the preliminary objection should be set aside, and that the case should go back to the Subordinate Judge to be dealt with by him as a Small Cause suit. The costs in this Court are to abide the result. C.R.P's. 752 to 757 follow.

1. (1902) I. L. R. 26 M. 200. 2. (1897) I. L. R. 21 M. 245.
3. (1902) I. L. R. 26 M. 368.

Sri Venkatachellapathy Vyavasaya Co. v. Kanakasabapathi Pillai Dharmum. — Benson J.

Benson J. C. R. P's. 751 to 757 of 1908)—I find it difficult to hold that these suits are not "suits relating to a trust" within the meaning of Art. 18 of the Provincial Small Cause Courts Act.

The 1st defendant is the trust itself. Defendants Nos. 2 to 4 are sued as trustees, and it is the trust property which the plaint seeks to make primarily liable for the sums claimed, the claim against defendants Nos. 2 to 4 personally being only an alternative claim. I do not think that the cases cited by the petitioner's pleader support his contention that such suits as those now in question do not "relate to a trust" nor do I think that the words at the end of Art. 18 ("including a suit, etc.") can be read so as to restrict the generality of the preceding words "suits relating to a trust."

The present suits, on the face of the plaints, involve the question of the liability of the trust property, and this directly raises the question of the trustees' right to deal with the trust property in the way they have done.

I therefore think that they relate to a trust and are not triable by a Small Cause court.

I would dismiss the petition with costs.

The *Chief Justice*:—As my learned brother differs, the point of law, which is stated in the judgment, will be referred to Mr. Justice *Sankaran Nair* under S. 98 of the Civil Procedure Code.

Before *Sankaran Nair* J.

N. Rajagopalachariar for *A. S. Balasubrmania Aiyar*, contended that the real test is whether the object of the suit is to enforce any provisions of the trust, *i.e.*, the carrying out of the trust.

S. Srinivasa Aiyar referred to *British Electrical Traction Coy.* v. *Inland Revenue Commissioners*[1] as to the meaning of the words "relating to."

Sankaran Nair J , on the 11th February 1910, delivered the following

JUDGMENT :—I agree with the Chief Justice. The orders of the Sub-Judge will be set aside and he will be directed to restore the suits to his file and dispose of them in accordance with law. It is open to him, if he thinks fit, to act under S. 23, Small Cause Courts Act. The parties will bear their own costs in this Court. The costs in the lower Court to be provided for in the final decree.

1. (1902) 1 K. B. 441.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

A. Subramania Iyer .. Appellant* (*4th Defendant*)

v.

P. Nagarathna Naicker and others .. Respondents (*Plaintiffs & Defendants* 1 *to* 3.)

Religious Endowments—Suit by worshippers against Temple trustees and their alienees for declaration that alienation is invalid and for possession—Decree, form of.

Subramania Iyer v Nagarathna Naicker

In a suit by the worshippers of a temple to have the alienation of trust property by some of the defendants, trustees, to the other defendants declared invalid and for posession to the trustees, the proper decree to be made, if the Court be of opinion that the alienation is invalid, is to decree possession to those defendants who are trustees. And the trustees need not be referred to a separate suit for the purpose.

As the trustees will hold possession not on their own behalf but only as trustees, no injunction restraining them from alienating is necessary.

Appeal from the decree of the City Civil Court, Madras, in O. S. No. 165 of 1906.

Suit on behalf of the worshippers of a public temple of the name of Sri Bala Vinayagar Kovil, to declare the alienation (sale) of the temple site by defendants 1 to 3 in favour of 4th defendant, invalid and to direct delivery of possession to the trustees, *viz.*, defendants 1 to 3. The City Judge declared the alienation invalid but decreed possession to plaintiffs on the groundthat the defendants were guilty of gross breach of trust and therefore unfit to retain possession of the site.

K. Srinivasa Aiyangor and *S. E. Sankara Aiyar* for 4th defendant-appellant.

Ethiraja Mudaliar for respondents-plaintiffs.

K. Srinivasa Aiyangar :—A decree cannot be given in favour of the plaintiffs who are mere worshippers. [*Sankaran Nair* J.—Why should not the decree direct possession to be delivered to the trustee-defendants?] On the findings of the Judge the proper course is for the plaintiff to sue for the removal of the trustees and appointment of fresh trustees who must sue for possession.

*-C. C. A. 21 of 1907. 14th July 1909.

Subramania Iyer v. Nagarathna Naicker.

Ethiraja Mudaliar :—The prayer in the plaint was that possession should be delivered to the trustees. We are agreeable to that course. But an injunction should be given restraining them from alienating.

The Court delivered the following

JUDGMENT :—The suit is filed by the plaintiffs under S. 30, Civil Procedure Code of 1882, for a declaration that the land in suit is the property of the temple of Bala Vinayagar and that the alienation of that land by the defendants Nos. 1, 2 and 3, the trustees, to the 4th defendant, is invalid, and for possession to be delivered to the trustees on behalf of the temple. It was contended by the defendants that the temple and the land alleged to belong to it was the private property of the defendant Nos. 1, 2 and 3. The Judge has found, and his finding is not impeached in appeal, that the temple in question is a public temple and the defendants Nos. 1 and 2 are the trustees thereof. The Judge has also held that the alienation in favour of the 4th defendant is invalid. But being of opinion that defendants Nos. 1 and 2 have been guilty of mismanagement he has directed possession to be delivered to the plaintiffs.

It is contended before us that the plaintiffs, who are only worshippers, are not entitled to possession, nor have they prayed to get possession. The Judge's decree for possession therefore, it is said, must be set aside.

We are of opinion that as defendants Nos. 2 and 3 are now trustees, the 1st defendant having died since the institution of the suit, they are entitled to the possession of the property. But we see no reason to agree with the contention of the appellant that such possession cannot be awarded to them in this suit. It is admitted that, after the declaration that the alienation in favour of the appellant is invalid, he is not entitled to retain possession of the property, and in a properly framed suit the trustees would be entitled to recover possession on behalf of the idol or temple. This suit is really brought to enforce the claim of the temple against the person who holds temple property without title, and we see no reason why the trustees should be referred to a separate suit to obtain possession on its behalf when posession may

be given to them in this suit. We accordingly modify the decree of the Court below and decree that possession be given to the 2nd and 3rd defendants as trustees. As they will hold posession not on their own behalf but only as trustees, it is unnecessary to issue any injunction as prayed for. As the appellant has substantially failed he will pay the respondents' costs.

Subramania Iyer v. Nagarathna Naicker.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Present:—Lord Macnaghten, Lord Collins, Lord Shaw and Sir Arthur Wilson.

Maung Tha Huyin ... Appellant*

v.

Maung Mya Su and others ... Respondents.

Maung Tha Huyin v. Maung Mya Su.

Mortgage—Priority—Assignment by the mortgagee—Assignee's mortgage of the mortgage property as owner—Assignee's mortgagor leaving title deeds with the assignee—Equitable mortgage by the assignee by deposit of title deeds—Assignee's mortgagor's suit for foreclosure—Equitable mortgagee not a party to the suit—Effect of the foreclosure decree on the equitable mortgagee—Practice—Remand.

A, an assignee of a mortgage sub-mortgaged his interest by way of deposit of title deeds to *B* in Oct. 1895 In March 1895, *A* purporting to be owner in fee executed a mortgage to *C*. In July 1902 *C* brough a foreclosure suit which was decreed by consent in the same month. *B* was not a party to the suit. But before *C*'s foreclosure suit *B* had obtained a decree for sale and purchased *A*'s interest. *B* now sued *A*, *C* and *A*'s original morigagors to enforce his mortgage. *Held*, that *B* not having been made a party to *C*'s suit his rights were unaffected and that the suit should be decided on enquiring as to the priority between *B* and *C*.

The circumstance that a prior mortgagee leaves the title deeds with the mortgagor would, if unexplained, justify the postponement of his security to the security of another, created by deposit of the deeds.

Their Lordships remanded a suit where they found it impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two principal parties concerned in it.

Appeal from a judgment and decree of the Chief Court of Lower Burma (April 23, 1907) reversing a judgment and decree of the Court of the District Judge of Amherst, (October 3, 1905).

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* 1909, November 9 and December 2.

Maung Tha Hnyin v. Maung Mya Su.

On May 12, 1903, the appellant instituted the suit in the Court of the District Judge of Amherst. The plaint alleged that by an instrument of mortgage, dated July 26, 1890, four owners, the first defendant Maung Tun Hla and Ko Auk Po, Ma Mut and Maung Auk Hta conveyed four plots of land (Nos. 1, 2, 3 and 4) unto the firm of M. M. R. M. Chetty to secure Rs. 11,000 and interest; that the said Ko Auk Po, Ma Mut and Maung Auk Hta were dead, and defendants Nos. 2 to 8 were their legal representatives; that by an instrument of transfer, dated November 8, 1894, the said firm of Chetty assigned for valuable consideration to one Abdul Rahiman the whole of that firm's right, title and interest in the loan and the aforesaid mortgage; that the appellant obtained a decree in the Court of the District Judge of Amherst, dated December 31, 1901, against the said Abdul Rahiman, ordering, *inter alia*, the attachment, and in default of payment of the decreed sum on July 10, 1902, sale of the said mortgage and of the right, title and interest of the mortgagee thereunder; that the appellant, bidding by permission of the Court, purchased the said mortgage, and thereupon acquired all the rights of the original mortgagee thereunder (August 28, 1902); and that before the said attachment and sale a portion of the mortgaged property, being plots Nos. 3 and 4, had already been sold by Abdul Rahiman. The appellant prayed for an account of the moneys due to him, an order for payment of the same, and consequential relief.

The defendants put in their written statements, but it is not necessary to refer to them here. On the death of the first defendant, Maung Tun Hla, his legal representatives were brought on record.

On July 23, 1903, Abdul Rahiman presented a petition to the Court praying that under Section 32 of the Civil Procedure Code, he (Abdul Rahiman), one Abdul Gaffoor and four others should be added as defendants to the suit. The grounds of the petition were, *inter alia*, that after the assignment of the mortgage deed to Abdul Rahiman by Chetty, the mortgage was satisfied by the mortgagors making over all the mortgaged property to the said Abdul Rahiman; and that after such satisfaction Abdul Rahiman mortgaged plots Nos. 1 and 2 to one

Abdul Gaffoor, who filed a suit against Abdul Rahiman and obtained a decree for foreclosure, and was the owner of the said plot. On that petition a consent order was made, and Abdul Gaffoor was added as defendant under it.

Abdul Gaffoor in his written statement alleged that the original mortgagors made over the whole of the mortgaged property absolutely in satisfaction of the debt to Abdul Rahiman, who on March 14, 1895, joined with one Eman Saib in mortgaging that same and other property to him, Abdul Gaffoor; that on July 21, 1902, a foreclosure decree was made by the Court in his favour in default of paying the mortgage debt and interest and costs within six months of the said date; that such default was made, and that thereupon he became the absolute owner of the said plots with possession. He denied that Abdul Rahiman had any interest in the said plots at the date of the sale to the appellant by order of the Court (which was August 28, 1902). On the death of Abdul Gaffoor his legal representatives were substituted for him on the record.

Further facts and the material issues in the case are set out in their Lordships' judgment.

At the trial the appellant waived his claim to any lien on plots 2 and 3. On the 2nd issue, whether the mortgage property was made over to Abdul Rahiman in satisfaction of the debt, the District Judge held that there was no evidence of any such absolute transfer; that Abdul Rahiman stepped into the shoes of the Chetty firm, the original mortgagees, and that he had acquired no better title than that of the original mortgagees. Having found the 2nd issue in the negative he deemed it unnecessary to deal with issues 3 and 4. In the result the learned Judge held that the appellant had acquired the rights of the original mortgagees as contained in the mortgage deed, dated July 26, 1890, in respect of plots 1 and 2, and found that the appellant was entitled to Rs. 11,000, with interest from July 26, 1890, the date of the execution of the original mortgage deed together with costs, and he granted the usual mortgage decree.

The representatives of Abdul Gaffoor thereupon appealed to the Chief Court, and *Fox* C.J., and *Hartnoll* J., who heard the appeal reversed the decree of the Court of the District Judge and

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dismissed the suit against all the defendants. The Chief Judge gave the following reasons for his decision :

"The appellants are the legal representatives of M. Abdul Gaffoor. They appeal on the ground, among others, that the Judge should have decided the 2nd issue in their favour and that he should have come to a finding on the 3rd and 4th issues, and such findings should have been in their favour.

"I am not prepared to hold that the Judge decided the 2nd issue wrongly, but his finding that the mortgaged property was not made over to Abdul Rahiman in satisfaction of the debt afforded no ground for not deciding the 3rd and 4th issues.

"The mortgage deed of the 14th March 1895, by which Abdul Rahiman mortgaged the properties in suit to M. Abdul Gaffoor is filed in suit No. 118 of 1902, in which M. Abdul Gaffoor obtained his foreclosure decree. No doubt Abdul Rahiman purports by it to transfer the land as owner, but if he was only mortgagee, the deed operated to transfer his interest as mortgagee. The rule is expressed in S. 8 of the Transfer of Property Act, thus :—' Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and the legal incidents thereof.'

"It was argued in this Court that the mortgage to M. Abdul Gaffoor was collusive and fraudulent, but no such question was raised in the District Court, nor was the fact that the mortgage deed had been executed, contested.

"In such a case it seems unnecessary to remand the case for a finding on the 3rd and 4th issues.

"The deed was executed and registered long before the plaintiff bought whatever he did buy in execution of his decree against Abdul Rahiman, and consequently the latter, at the time of the sale, had no interest in the property in suit either as owner or mortgagee.

"The plaintiff then did not stand in the shoes of the original mortgagee, and he had no right to proceed against the property in suit or against the surviving original mortgagor and legal representatives of the other mortgagors, or against any one now interested in the properties."

The judgment of *Hartnoll*, J. was as follows:—

"Maung Tha Huyin bought at the Court sale on the 28th August, 1902, the right, title and interest of Abdul Rahiman in the properties, the subject of the present suit. This right, title and interest seem to have been the interest Abdul Rahiman secured by the assignment to him of the mortgage deed of the 26th July, 1900, subject to a further charge of Rs. 6,000 created on the property by himself on the 14th March, 1895, and with regard to which a decree dated the 21st July, 1902, was then existing. Maung Tha Huyin must be held, in my opinion, to have stood in Abdul Rahiman's shoes in every respect. He did not satisfy the decree, and so, by the terms of it, he lost all interest that he obtained in the property by his purchase at the Court sale, on the 21st January, 1903. I am, therefore, of opinion that he cannot now sue in respect of it on the case that he now sets up.

"At the hearing of the appeal it was suggested that the deed of the 14th March, 1895, was a fraudulent one, and, further, that S. 78 of the Transfer of Property Act should be considered. These matters were not part of Maung Tha Huyin's case and are not mentioned in the pleadings, and, in my opinion, they cannot now be raised. Maung Tha Huyin sued as the auction-purchaser of Abdul Rahiman's right, title and interest, and on that alone.

"I, therefore, concur in the order proposed by the learned Chief Judge."

Against the decree of the Chief Court the appellant appealed to His Majesty in Council.

J. W. McCarthy, for the appellant:—The appellant's full titles to the plots in question as equitable mortgagee, holder of foreclosure decree, conveyance by the Court, and purchaser at public auction, are put in issue by the appellant in paragraph 5 of his plaint by reference to the record in his foreclosure suit (No. 77 of 1901) and his case is not confined merely to his position as decree-holder as held by the appellate Court. And even if the said plaint limits the appellant's title to that of decree-holder only, such title was complete as against the original mortgagors, and neither Abdul Rahiman nor Abdul Gaffoor

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had any better title. The appellant's title ought, under the proved or admitted facts of the case, to have obtained priority over that of Abdul Gaffoor on the ground that Abdul Gaffoor having failed to get in the title deeds to the said property or subsequently having parted with them, enabled the mortgagor to obtain advances from the appellant, and Abdul Gaffoor was thereby guilty of gross neglect within S. 78 of the Transfer of Property Act, 1882; that the appellant, by the purchase of the said properties at public auction held by order of the Court, and by having a conveyance of the same to him by the Court, acquired an indefeasible title to the said properties, independent of his titles as equitable mortgagee and decree-holder ; and that Abdul Gaffoor, as usufructuary mortgagee, had no right in law to a foreclosure decree and only obtained such decree by collusion with Abdul Rahiman, the transferor, who abstained from making the appellant a party to the proceedings and concealed from the Court the fact that a year previously the Court had made a similar decree in favour of the appellant over the same property and collusively and fraudulently consented to Abdul Gaffoor obtaining a decree to which in law or in fact he was not entitled. Abdul Rahiman, being only a mortgagee himself, with the equity of redemption outstanding in the original mortgagors, could not grant a mortgage over the same premises to another person; therefore the deed of mortgage of the two plots in question to Abdul Gaffoor was null and void, and the learned Chief Justice of the appellate Court was wrong in holding that the operation of S. 8 of the Transfer of Property Act, of 1882, converted an abortive mortgage of the fee or an usufructuary mortgage into a transfer of a wholly different interest. The interest of all parties over the plots in question are merged in the judgment in favour of the appellant for foreclosure and sale of the same in suit No. 77 of 1901, and Abdul Gaffoor's only remedy is against Abdul Rahiman on the personal convenant in the mortgage of March 14, 1895, or to move to set the said judgment aside, which he has not done, while Abdul Rahiman's suit to that end was dismissed. Whatever the force and effect of the alleged mortgage by Abdul Rahiman to Abdul Gaffoor, the foreclosure decree in Abdul Gaffoor's favour, of July 21, 1902, was a nullity in as much as it purported to be the foreclosure of a mortgage

which Abdul Rahiman (as both Courts agree) had no power to grant, and not a foreclosure of the original mortgage which the Chief Court held (erroneously, it is submitted) was transferred to Abdul Gaffoor; and the mortgagors of the first mortgage in whom the equity of redemption was outstanding were not before the Court, nor was the said original mortgage considered by the Court in making its decree.

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The respondents did not appear.

The Judgment of their Lordships was delivered by

Lord Macnaghten:—This is an appeal in a mortgage suit. It was heard *ex parte*.

It is the appeal of the plaintiff from a judgment and decree of the Chief Court of Lower Burma, on its Appellate Side, reversing a judgment and decree of the Judge of the District Court of Amherst, which was in the plaintiff's favor, and dismissing his suit with costs.

Owing to the confused state of the record and the manner in which the case was presented to the Courts below, their Lordships have felt more than the ordinary difficulty which attends an *ex parte* hearing in dealing with the materials placed before them. They find it impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two parties principally concerned.

Some of the facts are beyond dispute.

On the 29th July, 1890, four persons, who are all dead and are now represented by the first eight respondents, mortgaged four plots of ground, Nos. I, II, III, IV, in or near Moulmein, to the firm of M. M. R. M Chetty for the purpose of securing Rs. 11,000 and interest. The mortgage is Exhibit *D*.

On the 8th of November, 1894, the Chetti firm assigned the mortgage debt and transferred the security for it to one Abdul Rahiman. The transfer is Exhibit *A*.

In October, 1895, Abdul Rahiman deposited the title deeds of the mortgaged property (Exhibits *A* and *B*) with the plaintiff by way of equitable mortgage.

In 1901 the plaintiff brought a suit (No. 77 of 1901) against Abdul Rahiman, Abdul Rahiman's father Emam Sahib, and others,

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to enforce certain mortgage securities, including that created by the deposit of Exhibits *A* and *B*.

On the 31st of December, 1901, the District Court of Amherst found that the deposited title deeds were held by the plaintiff by way of equitable security and a decree for sale was pronounced in default of payment. Payment was to be made before the 10th of July, 1902.

In pursuance of this decree, the right, title and interest of Abdul Rahiman in the property comprised in the deposited deeds, Exhibits *A* and *B*, were put up for sale on the 28th of August, 1902. The plaintiff who had the leave of the Court to bid, was declared the purchaser for Rs. 5,000. A certificate to that effect, under the hand of the District Judge and the seal of the Court, was endorsed on Exhibit *A*.

So far there seems to be no room for dispute, and if it had not been for a claim put forward on behalf of one Abdul Gaffoor, whose brother was married to Abdul Rahiman's sister, the decree of the District Court would seem to have been substantially right under the circumstances.

Abdul Gaffoor's claim was brought on the record in the following manner. On the present suit being instituted, Abdul Rahiman presented a petition, asking that he and Abdul Gaffoor might be made parties. His story was that, after the assignment to him of the mortgage debt, the mortgage was satisfied by the mortgagors making over to him all the mortgaged property, and that he mortgaged the property No. II to Abdul Gaffoor, who filed a suit against him, obtained a decree for foreclosure, and thus became the owner of the property.

By consent, Abdul Gaffoor was added as a defendant. He put in a written statement, in which he alleged that Emam Sait and Abdul Rahiman, as owner, mortgaged to him, amongst other property, plots I and II by a registered deed dated the 14th of March, 1895; that he brought a suit for foreclosure (No. 118 of 1902); that a decree was passed in his favor for payment or foreclosure; that default was made in payment; and that he became the absolute owner of the mortgaged property.

No amendment was made in the statement or in the prayer of this plaint in consequence of Abdul Gaffoor being added as a defendant.

The following issues, with others which are not now material, were framed by the Judge :—

1. Was Exhibit *B* executed by the parties named as mortgagors?

2. Was the mortgaged property made over to Abdul Rahman in satisfaction of the debt ?

3. Did Abdul Rahiman mortgage properties I and II to Abdul Gaffoor ?

4. Did this property, by virtue of the decree in No. 118 of 1902, become the absolute property of the defendant Abdul Gaffoor?

5. What rights, if any, did the plaintiff acquire by his purchase of the bonds, Exhibits *A* and *B* ?

6. To what relief is the plaintiff entitled ?

On the 3rd of October, 1905, the District Judge delivered judgment. He found that Exhibit *B* was duly executed, and that the mortgaged property was not made over to Abdul Rahiman in satisfaction of the mortgage debt.

Abdul Gaffoor, though represented by counsel at the hearing, did not offer himself as a witness, nor was there any evidence on his behalf beyond the production of the registered deed of the 14th March, 1895, and the decree in the Suit No. 118 of 1902, dated the 21st of July, 1902. He seems to have rested his case on Abdul Rahiman's story, which was disbelieved, and not to have claimed the rights of a mortgagee in any event. As he did not go into the witness box, there was no explanation of the fact that, notwithstanding the alleged mortgage to him, the title deeds, Exhibits *A* and *B*, were left with Abdul Rahiman, a circumstance which, unexplained, would justify the postponement of his security, if any, to the security of the plaintiff created by the deposit of those deeds.

It is to be observed that the Suit No. 118 of 1902 was instituted early in the month of July, 1902. The decree was made by consent on the 21st of that month. Now, the 10th July, 1902, was the date fixed for payment in the plaintiff's Suit No. 77 of 1901. It is difficult to imagine that Abdul Gaffoor was in ignorance of what had been done in that suit. There seems to be ground for supposing that the Suit No. 118 of 1902 was instituted for the purpose of defeating the decree in the Suit No. 77

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of 1901 in so far far as it related to Exhibits *A* and *B*. However that may be, it is material to bear in mind that the plaintiff was not made a party to No. 118 of 1902, nor was the decree served on him, and therefore his rights, whatever they may have been, remained unaffected by the decree in that suit.

In August, 1902, Abdul Rahiman, who according to his own account, had at the time no interest in the mortgaged property, brought a suit, No. 159 of 1902, against the plaintiff, to have it declared that the mortgage of the 26th July, 1890, Exhibit *B*, and the assignment of the 8th November, 1894, Exhibit *A*, did not form any portion of the mortgaged property affected by the decree in No. 77 of 1901. On the 28th of August, 1902, suit No. 159 of 1902 was dismissed with costs.

The learned Judge of first instance, dealing with the present case, was of opinion that, as issue No. 2 had been decided in the negative, there was no need to go into issues Nos. 3 and 4, and, after observing that the plaintiff had waived his claim to any lien on properties III and IV, decided that the plaintiff had acquired the rights of the original mortgagee as contained in Exhibit *B*, in respect of properties I and II; and he came to the conclusion that the plaintiff was entitled to a mortgage decree on properties I and II to the extent of Rs. 11,000 with interest. As it was not asserted by any of the defendants that any portion of the principal and interest due on the mortgage, Exhibit *B*, had been paid, the learned Judge did not think it necessary to direct an account of what was due on the mortgage, though it was asked for by the plaint.

From this decree the representatives of Abdul Gaffoor, who was then dead, alone appealed. Judgment on the appeal was given on the 23rd of April, 1907. The Chief Judge did not dissent from the judgment of the Court below on issue No. 2. But he held that the deed of the 14th of March, 1895—which on the face of it appears to be a mortgage by an owner in fee, and was at most a sub-mortgage as Abdul Rahman was not the owner of the property, but transferee of the mortgage Exhibit *B*—was assigned to him by Exhibit A. "The deed," he observes—that is, the deed of the 14th March 1895—"was executed and registered long before the plaintiff bought whatever he did buy in execution of his decree against Abdul Rahiman, and consequently the latter,

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at the time of the sale, had no interest in the property in suit either as owner or mortgagee."

That view seems to their Lordships to be quite untenable. Indeed it does not appear to have been suggested by anybody at the hearing before the Chief Court.

The view of *Hartnoll* J., who was the other Ju lge in the Chief Court, was not the same as that of the Chief Judge, but it seems to be equally untenable. He thought the plaintiff must be " held to have stood in Abdul Rahiman's shoes in every respect. " " He did not," the learned Judge adds," satisfy the decree " that is the decree of the 21st of July, 1902" and so by the terms of it he lost all interest that he obtained in the property by his purchase at the Court sale on the 21st January, 1903." The sale was on the 28th of August, 1902. The error in date is immaterial. But it is difficult to see how the plaintiff could be barred or affected by a decree in a suit to which he was not a party.

Their Lordships are, therefore, of opinion that the judgment of the Chief Court should be reversed with costs to be paid by the appellants in that Court, the representatives of Abdul Gaffoor, the decree of the District Judge discharged, and the suit remanded to the District Judge for findings on issues 3 and 4, with an enquiry as to priority between the plaintiff and Abdul Gaffoor and for retrial. The District Judge will deal with the costs not dealt with by this judgment.

Their Lordships will humbly advise His Majesty accordingly.

The last three respondents, the representatives of Abdul Gaffoor, who alone appealed to the Chief Court, will pay the costs of the appeal.

Appeal allowed and the suit remanded.

Messrs. Bramall and White:—Solicitors for appellant.

The respondents did not appear.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Present:—Lord Macnaghten, Lord Collins and Sir Arthur Wilson.

Sardar Ganpat Rao, Moharkar .. Appellant*

v.

Sardar Anand Rao, Baji Sahib, Moharkar .. Respondent.

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Pensions Act, XXIII of 1871, S. 6.—Certificate under that section—Collector's order referring the parties to Civil Court—Certificate produced in the Court of Appeal —Sanad—Construction—Grant of the soil of a village.

Where in a partition suit the Subordinate Judge decreed partition of certain villages, holding that an order of the Collector, referring the parties to Civil Court to determine whether the said villages were partible, was equivalent to a certificate under S. 6 of the Pensions Act, XXIII of 1871, and the High Court on appeal allowed the plaintiff to procure and file a certificate under the said section of the said Act and confirmed the decree of the lower Court, their Lordships saw no reason to differ from the conclusion of the High Court.

Where the Subordinate Judge decreed partition of a village, holding that, though it came within S. 6 of the Pensions Act, XXIII of 1871, the want of a certificate was sufficiently met by an order of the Collector referring the parties to Civil Court to determine whether the said village was partible, and the High Court on appeal confirmed that decree, holding that the sanad, by which the British Government confirmed the land, was not a grant of land revenue but of the soil of the village itself, their Lordships saw no reason to differ from the two Judges of the High Court on a question of construction, particularly as it seemed to them that the Subordinate Judge was fully justified in treating the said order of the Collector as dispensing with the said certificate. [*Ganpat Rao* v. *Anand Rao*[1] confirmed.]

Appeal from a judgment and decree of the High Court of Judicature for the North-Western Provinces, Allahabad, (July 10, 1905), modifying a judgment and decree of the Court of the Subordinate Judge of Jhansi (June 30, 1902).

On May 2, 1866, the British Government granted to one Jagdeo Rao, who was the Commander-in-Chief of the Army of the Maharaja Scindhia, of Gwalior, at the time of the Indian Mutiny, a *Sanad*, which conferred upon him, as a reward, in perpetuity, the villages of Satwansa, Rames-ara and Raipur (hereinafter referred to as 'the three villages'), subject to the conditions of loyalty, and the payment of an annual revenue of Rs. 854, and also the Government revenue of the village of Mahur situated in the District of Poona, in the Bombay

* 1909, November 17, and December 16.

1. (1905) I. L. R. 28 A. 104.

Presidency. The three villages were situated in the District of Jhansi in the North-Western Provinces.

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By another *Sanad*, dated December 1, 1856, the British Government declared that the village of Warur Buzurg "shall be continued by the British Government to the said Jagdeo Rao *bin* Sultan Rao, and his heirs, lineal or adopted, exclusive of all lands, allowances, and rights belonging to others, for so long as he, the said Jagdeo Rao *bin* Sultan Rao, his heirs, shall continue loyal to the British Government, and shall pay to it the sum of Government Rupees 800. On failure of either of these conditions, *viz.*, loyalty, and due payment of quit rent, the village will be liable to be resumed by the British Government." The Sanad guaranteed the holder against any further payment on account of Imperial revenue beyond the sum therein mentioned, but it declared that the village and its holder would be liable for any local taxation which might be imposed in the district generally. The village of Warur Buzurg was situated in the District of Ahmednagar in the Bombay Presidency.

Jagdeo Rao died on January 6, 1872, leaving him surviving three sons, Sultanji Rao, Tantya Saheb, and Ananda Rao, the respondent. Tantya Saheb had, prior to Jagdeo Rao's death, been adopted into another family. Mutation of names was effected in regard to the property in the Presidency of Bombay in the name of Sultanji Rao, the eldest son, while in regard to the three villages the names of both Sultanji Rao and Anand Rao were entered in place of their father. On the death of Sultanji Rao, which event occurred on April 17, 1892, he left him surviving two sons, Ganpat Rao, the appellant, and Krishen Rao, but in the Registers both in Bombay and in the North-Western Provinces the name of Ganpat Rao alone was substituted for that of Sultanji Rao. In April, 1899, Anand Rao applied to the Revenue Court for a perfect partition of the three villages. On October 26, 1899, the Collector of Jhansi ordered that the question as to whether the property was capable of partition should be decided by the Civil Court. On appeal the Board of Revenue confirmed that order.

Anand Rao, therefore, on March 18, 1901, brought the present suit against Ganpat Rao in the Court of the Subordinate Judge of Jhansi. The plaint recited the above facts, and prayed

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for a declaration that the plaintiff (respondent) was entitled to a half share in the properties therein specified; and for delivery of possession of the said share in pursuance of the said declaration.

For the purposes of this report it is necessary to refer only to one plea raised by the appellant in his written statement of defence, *viz.*, that as the plaintiff had not, before the institution of the suit, produced a certificate under S. 6 of the Pensions Act (XXIII of 1871) the suit could not be proceeded with.

The Subordinate Judge, in his judgment, classified the properties in suit as follows:—(*a*) Mahur. (*b*) Houses and land situate in Mahur. (*c*) Warur Buzurg. (*d*) Houses in Warur Buzurg. (*e*) The three villages in the Jhansi District.

He held that the whole of the suit except so far as it related to the lands in Mahur (*b*) was governed by S. 4 of the Pensions Act, and that as the certificate prescribed by S. 6 of that Act was not produced by the plaintiff, the suit so far as it related to (*a*), (*c*) and (*d*) could not be entertained. He thought, however, that having regard to the orders of the Revenue Courts, he was not debarred by S. 4 of the Pensions Act from entertaining the suit so far as it related to (*e*); and he found that the plaintiff was entitled to have the three villages partitioned. As to certain patelji land and 400 acres in Mahur he held that the property in the soil itself, not the mere right to a revenue therefrom, was the subject-matter of the claim, and, therefore, they were not governed by S. 4 of the Pensions Act. On June 30, 1902, the Subordinate Judge made a decree giving effect to his findings.

The appellant appealed to the High Court at Allahabad, and the respondent filed cross-objections. The High Court adjourned the hearing of the appeal to enable the respondent to obtain a certificate under the Pensions Act in regard to the three villages. The respondent obtained and filed the necessary certificate, and the High Court dismissed the appeal so far as it related to the three villages. As regards the village Mahur, the respondent was allowed to abandon his suit, with liberty, if so advised, to bring a fresh suit in regard to it. As regards Warur Buzurg, the High Court held that the *Sanad*, dated December, 1866, was a grant of the soil of the village itself, and not of land

revenue, and that, consequently, the Pensions Act did not apply. The respondent's claim in respect of the houses situate in the village Warur Buzurg was also allowed and in other respects the decision of the lower Court was confirmed. A decree modifying the decree of the lower Court was drawn up on July 10, 1905. For a report of the case see *Ganpat Rao* v. *Anand Rao.*[1]

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Defendant appealed to His Majesty in Council against the decree of the High Court.

De. Gruyther, K. C., and *P. C. Dutt*, for appellant, contended that as regards the village Mahur, the grant was that of land revenue, and as there was no certificate under S. 6 of the Pensions Act (XXIII of 1871), the High Court ought not to have allowed the plaintiff to withdraw the suit in respect of that village, but it ought to have dismissed the same with costs. The village Warur Buzurg was held on the same terms as the village Mahur, and the High Court is not right in interpreting that the *Sanad* of December 1, 1866, was a grant of the soil itself. It was merely a grant of land revenue, and the suit in respect of that village also should be dismissed. Those two villages in the Bombay Presidency were inam villages and could not be partitioned. Reference was made to Inam Land and whether such land was partible, to sections from the records of the Bombay Government, No. CXXXII, new series; Narrative of the Bombay Inam Commission and Supplementary Settlements, by Colonel Alfred Thomas Etheridge, (1873) p. 4; a Hand-Book for Revenue Officers in the Presidency of Bombay, by Alexander Kyd Nairne, (1872), pp. 341 and 343; Bombay Regulation XXIX of 1827; *Adrishappa Bin Gagdiappa* v. *Grushidappa Bin Gagdiappa*[2]; and to *Ramchandra Mantri* v. *Venktarao and another*[3] wherein the case of *Raoji Narayan Mandlik* v. *Dadaji Bapuji Desae*[4] relied on by the High Court is discussed.

As regards the three villages in the N. W. P. the necessary certificate was produced in appeal before the High Court. But the first Court could not take cognisance of the claim in respect of those villages without receiving a

1. (1905) I.L.R. 28 A. 104.
2. (1880) L. R. 7 I. A. 162.
3. (1882) I L.R. 6 B. 598, at pp. 600, 602, 603 and 606.
4. (1875) I.L.R. 1 B. 523.

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certificate from the Collector, whose order of October 26, 1899, referring the parties to Civil Court, is not a certificate within the meaning of the Pensions Act, S. 6—*Nawab Muhammad Agmat Ali Khan* v. *Musammat Lali Begum*[1]. Certain lands, which paid no revenue but were service inam lands, were impartible and subject to the Pension Act, the certificate under which must be produced at the time of the institution of the suit. There was no such certificate, and the claim in respect of that part of the suit must also be dismissed.

G. E. A. Ross, for respondent, contended that as regards the three villages in N. W. P. there was a concurrent finding that the same were partible, and the High Court was right in allowing the adjournment of the appeal to enable the respondent to file the necessary certificate. It was merely a technical objection. The withdrawal of the suit in respect of the village Mahur was within the discretionary power of the High Court and should not be interfered with. Again, there is no appeal when an order of withdrawal is made under S. 373 of the Civil Procedure Code (Act XIV of 1882). The *Sanad* of December, 1, 1866, relating to Warur Buzurg, is, as held by the High Court, a grant of the village itself. The decree of the High Court should be affirmed.

De Gruyther, K. C., in reply, made further reference as to inam land and whether the same is partible, to *Shekh Sultan Sani* v. *Shekh Ajmoodin*[2], and to Land Systems of British India, by B. A. Baden-Powell, (1892), Vol. III, p. 140.

The Judgment of their Lordships was delivered by *Lord Collins* :—The question in this case is as to the respective rights of certain members of the family of one Jagdeo Rao, who was Commander-in-Chief of the Maharajah of Scindia, Gwalior, at the time of the Indian Mutiny, in respect of certain villages and lands, situate part in Bombay and part in the N.W. Provinces, an interest in which was conferred upon him by the British Government in perpetuity as a reward for his services subject to the conditions of loyalty and the payment of an annual sum. The appellant, Sardar Ganpat Rao, is the eldest son of Sultanji Rao, deceased, who was the eldest son of Jagdeo Rao. The

1. (1881) L. R. 9 I. A. 8 at p. 20.
2. (1891) L. R. 20 I. A. 50.

respondent, Anand Rao, is the third surviving son of Jagdeo Rao. This litigation began through a claim put forward by Anand Rao for a partition of all the family property. Ultimately, the present suit, which was brought by Anand Rao, as plaintiff, against his nepew, Sardar Ganpat Rao, for partition, came before the Subordinate Judge of Jhansi. Numerous issues were stated and disposed of by the learned Judge, but that which was most discussed in respect of each portion of property embraced in the claim was that which raised the question whether the want of a certificate under S. 6 of the Pensions Act XXIII of 1871 was a bar to the action in respect of each of the portions of land in which rights were claimed. The learned Judge made a list of each of the parcels and dealt with each separately. He held that the want of a certificate was a bar as to all but a few of the parcels, *viz.*, (*a*) three Jhansi villages, as to which he held that a certain order made by the Collector of Jhansi, of 26th October, 1899, was equivalent to a certificate under S. 6, and (*b*) certain portions of land in the village of Mahur, as to which he held that the property in the suit itself, not the mere right to a revenue therefrom, was the subject-matter of the claim, and therefore did not fall within S. 6 of the Act; but as to all the rest of the parcels, including the village of Warur Buzurg and the lands therein, he held that S. 6 applied, and dismissed the claim.

The defendant thereupon appealed to the High Court and the plaintiff filed an objection under S. 561 of the Code of Civil Procedure, claiming in effect that he was entitled to have his whole claim decreed. But by the time the appeal came to be heard the field of controversy was considerably narrowed. The Court, at the outset of their judgment say:—"Only two matters have been pressed before us in appeal by the learned counsel for the appellant. They are in respect of three villages, in the Jhansi District and a portion of the 440 acres of land in the Poona District, in respect of which the claim for partition was allowed." They then go on:—"As regards the three villages in the Jhansi District, the objection which was raised in the grounds of appeal is that the property was subject to the provisions of the Pensions Act, No. XXIII of 1871, and that no certificate was obtained under S. 6 of that Act before the institution of this suit, and so the

Ganpat Rao v. Anand Rao. Court had no jurisdiction to try the case. That defect, if any, has been cured. This Court allowed the hearing of the appeal to be adjourned in order to enable the respondent to procure a certificate and so avoid the necessity of disposing of the technical question raised in regard to it. The result is that the appeal in respect of the three Jhansi villages fails."

They then deal with that part of the 440 acres in respect of which the partition was allowed, and agree with the Subordinate Judge's decision, which is one of fact, thereon. Therefore, on this point also, the appeal failed.

They then deal with the respondent's objections. First, that the village of Mahur should not have been excluded from the decree in favor of the plaintiff, as it was not covered by S. 6 of the Pensions Act. On this point they allow the plaintiff to abandon his suit as regards that village with liberty, if so advised, to institute a fresh suit in regard to it. The only exception as to this was that the terms as to costs were too easy upon the plaintiff. But the matter was clearly in the discretion of the Court in view of the circumstances to which they refer.

The next relates to village of Warur Buzurg as to which the learned Subordinate Judge had held, though it came within S. 6 of the Pensions Act, that the want of a certificate was sufficiently met by the order above referred to. The High Court, without expressing any opinion on that point, held that the *Sanad* by which the British Government, on 1st December 1866, confirmed the land to Jagdeo Row was not a grant of land revenue but of the soil of the village itself, and consequently that the Pensions Act did not apply.

Their Lordships are not disposed to differ from the two Judges of the High Court on a question of construction, particularly as it seems to them that the learned Subordinate Judge, for the reasons he gave, was fully justified in treating the order as dispensing with the certificate. The learned Judges go on to point out that counsel for the respondent had abandoned his point as to the property in Mahur contained in the five deeds of sales. They also treated the houses in Mahur and the Poona District as covered by the reasons given in regard to the remainder of the 440 acres included in the decree and partitioned.

Their Lordships see no reason to differ from these conclusions. The result is that, in their Lordships' opinion, the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: *T. L. Wilson & Co.* for appellant.

Solicitors: *Pyke Parrott* for respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT CALCUTTA.]

Present :—Lord Macnaghten, Lord Collins and Sir Arthur Wilson.

Raja Peary Mohun Mukerji .. Appellant*

v.

Narendra Nath Mukerji and others .. Respondents.

Religious Endowment—Executors—Suit by, to recover from the trust estate money spent by the testator as trustee—Amendment of plaint—Its effect on the character of the suit—New defendant—Limitation—Shebait—His right of re-imbursement—Expenditure—Preservation of the trust estate—Government revenue—Cost of defending his position as shebait—Performance of the obligations imposed by the instrument creating the trust—Trustee's right of indemnity—Liability of the trust estate for such indemnity—Shebait's expenditure in excess of actual income, when justified.

On January 25, 1895, the respondents as executors of a *Shebait* of a debutter estate, who died on January 29, 1894, brought the suit to recover a sum of money alleged to be due to the deceased in his capacity as *Shebait* either from the debutter estate or from the principal defendant, the appellant, personally. The instrument by which the endowment was made was a will, which provided for the order of succession to the office of *Shebait* among the testator's own descendants and all the surviving descendants of the testator were made defendants, of whom the appellant, who had been appointed Receiver of the debutter estate was sued both in his capacity of Receiver and in his personal capacity. Under an order of the High Court remanding the suit, the prayer of the plaint was amended six years after the date of the death of the *Shebait* so as to raise directly the question as to the right to the office of *Shebait*, and the representation of the debutter estate. The Courts in India held that the appellant must be considered to be the *Shebait*, and, as such, the proper person to represent the debutter estate. It was contended that the suit against the debutter estate was barred by limitation.

Held, that the amendment directed by the High Court did not alter the character of the suit and no new defendant was brought on the record : that the period of limitation was the period of six years from the date of the *Shebait's* death ; and that the suit, therefore, was instituted in time.

Held, also, that the estate of a deceased *Shebait* was entitled to be re-imbursed (1) all sums properly expended by him in the preservation of the trust estate as, for instance, all moneys paid in respect of Government revenue and the like; (2) all moneys properly expended by him in defending his position as *Shebait*, which was challenged unsuccessfully—*Walters v. Woodbridge*[1]—and (3) all moneys properly expended in performing the obligations imposed upon him by the instrument creating the trust or endowment.

* 1909, November 11, and December 16.

1. (1878) 7 C. D. 504.

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Held, further, that the right of indemnity was incident to the position of a trustee and that the liability in respect of that indemnity was the first charge on the trust estate.

Where the trustee received an income less than the calculated income owing to the wrongful acts of the respondents, but spent more than the annual amount received in maintaining the religious observances prescribed by the Founder of the trust in the reasonable expectation that at the cessation of the wrongful acts of the respondents the income would be sufficient to defray the expenditure incurred in the meantime.

Held, that under the circumstances the *Shebait* was justified in spending more than he actually received from the trust estate, and that his executors were entitled to be reimbursed from the trust estate.

Appeal from a judgment and decree of the High Court at Calcutta (February 24, 1905) affirming a judgment-decree of the Subordinate Judge of Hooghly (June 30, 1903).

The substantial question for determination in the appeal was whether the respondents were entitled to the money decreed to them by the lower Courts.

On September 11, 1840, one Jaga Mohan Mukerji, who died subsequently in the same year, made a will. The following are the terms of his will, whereby he dedicated certain properties to the *Sheba* of two *Thakurs*, for the annual celebration of *Durga Puja* and other pious acts, and laid down the order of succession of the *Shebaits* from among his own descendants :—

" And in regard to the Collectorate taluks, Putni taluks, rent free lands, &c., which I have specified in paragraph 5 of the schedule given below the body of this will and set apart for the expenses of the *Shebas* of Sridhur Thakur and Gopaleshwar Shid established by me and the annual celebration of the Durgapuja and the performance of the *sradh* ceremony in honour of my ancestors, and other pious acts, I direct that from the profits of the said properties the *Shebas* of the said adorable Thakurs and other acts shall be performed, the surplus being devoted to the suitable maintenance of the sonless widows in the family, and to the construction of roads for public use, to the excavation of tanks, and other pious acts. As a provision against drought and other providential calamities, the surplus will be gradually accumulated, until it amounts to the Government revenue for one

1. (1905) I. L. R. 32 C 582.

year, and then Government Promissory Notes shall be purchased therewith and kept in stock; and what remains surplus after that shall be suitably applied to the construction of roads, and other pious acts. I appoint my eldest son Joy Krishna Mukerji and Hara Nath Chatterji, a resident of Ittarpara, to the office of *Shebaits* of the said Thakurs as attorneys. The said attorneys will possess and make settlements of all the said properties as if they were the owners thereof, and will give effect to all these provisions, and neither they nor their heirs shall be at liberty to alienate the said properties by sale or gift. After the death of Joy Krishna Mukerji (attorney), Rajkrishna Mukerji will be appointed in his place, and after the death of the said Rajkrishna his step brother Naba Krishna Mukerji, and after the death of Naba Krishda, his step-brother Bijoy Krishna Mukerji, will be appointed to the office of attorney. After the death of my sons, Joy Krishna Mukerji and others, the eldest son in the family amongst their respective sons, grandsons, and other successive descendants, being appointed as attorney to this effect will perform the *Shebas* of the *Thakurs* and other acts as aforesaid, and so long as a male descendant is alive in their family, no daughter or daughter's son shall be appointed attorney to the above effect. Hara Nath Chatterji, the second attorney for the said purpose, shall remain as attorney during his lifetime, and acting in concert with the attorney, my son, shall perform the worship and other acts aforesaid, and after the death of the said Chatterji, attorney, his heirs will have no connection with the office of attorney, but my sons, and their heirs in order of succession, shall discharge his duties as aforesaid.

In the Schedule attached to the will particulars of the properties dedicated under it were given under the following headings:—

" Para 5—specified debutter mahal, from the income of which as aforesaid (the *Shebas* of) Gopaleshwar Shib and Sridhar Thakur, and annual Durgapuja and the *sradh* in honour of the paternal and maternal ancestors will be performed, the *Shebaits* being Joy Krishna Mukerji and Haranath Chatterji :———"

The first *Shebait* was Joy Krishna Mukerji, the father of the appellant. He was succeeded by his step-brother Babu Naba

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Krishna Mukerji, and when the latter died in 1890, his successor was another step-brother, named Bijoy Krishna Mukerji, the father of the respondents. Bijoy to some extent obtained possession of the debutter estate. The appellant, however, disputed his title as *Shebait*, and seriously interfered with his possession, and eventually a suit (No. 40 of 1892) was brought by Bijoy to establish his right as *Shebait*, and to recover possession of the estate. While the suit was pending a receiver of the debutter estate was appointed. On January 24, 1894, Bijoy obtained a decree in his favour, and on that day he died. Bijoy made a will appointing the respondents his executors, who obtained probate on March 2, 1894. The respondents were substituted for Bijoy in suit No. 40 of 1892, in which the decree was drawn up on October 31, 1894. After the death of Bijoy, the appellant was appointed receiver of the debutter estate in place of the receiver originally appointed in that suit. The appellant appealed to the High Court against the decree of October 31, 1894, which was virtually affirmed on August 29, 1898.

On January 25, 1897, the respondents brought the present suit in the Court of the Subordinate Judge of Hooghly against the appellant as receiver of the debutter estate, and also in his personal capacity; and they also made all the surviving heirs of the said Jaga Mohan Mukerji defendants in the suit, as there was a dispute as to who was the proper person to be appointed *Shebait* of the debutter estate, according to the terms of the will, dated September 11, 1840. The respondent as plaintiff alleged that owing to the interference of the appellant, and the obstacles thrown in the way of their father, Bijoy Krishna Mukerji, in the realisation of rents and profits from the debutter estate, he was able to realise only Rs. 4,706-4-5, and had to spend Rs. 71,522-5-10 from his private funds on account of the debutter estate, and that after the death of their father, they had to pay Rs. 6,392-4-0 on account of the debts of the debutter estate. In all they claimed Rs. 77,964-9-6 as due from the debutter estate. They prayed for a decree for the recovery of that sum from the said estate, and that, in the alternative, if, in the opinion of the Court, it were found that the appellant was, by reason of his improper acts, bound to pay the money claimed or any portion thereof, a decree might be passed against him personally.

The appellant defended the suit on various grounds, pleading, *inter alia*, that the suit was barred by limitation, that the accounts produced by the respondents were false and fabricated, and that neither the debutter estate, nor the appellant personally, was liable to pay the money claimed.

On February 7, 1899, the Subordinate Judge made a decree. He held that the claim was not barred by limitation, and that the appellant was personally liable for the claim so far as he had realised money belonging to the debutter estate, and that, for the rest of the claim, that estate was liable for such costs and losses as, on inquiry by a commission, should be found reasonable. The appellant appealed to the High Court. On November 28, 1900, the High Court decided that the claim against the appellant personally could not be maintained, and that it was also barred by limitation against him personally. With regard to the claim against the debutter estate, the learned Judges held that it was not so barred, but, as the debutter estate was not represented in the suit, they remanded the suit, in order that the plaint might be amended so as to include the prayer that a *shebait* of the debutter property might be determined, and that the debutter estate might be represented by him.

On July 8, 1901, the plaint was therefore amended in accordance with the permission given by the High Court, and the appellant filed a further written statement containing practically the same pleas in answer to the suit as were recorded in his previous written statement.

The following issues were framed by consent of parties at the trial of the suit held on remand :—

1st—Is it necessary for the plaintiff to value separately, and to pay Court-fees for that valuation, for his additional new prayer in the plaint?

2nd—Is there a misjoinder of parties in this suit?

3rd—Is the suit defective for plaintiff's omission to make idols, Gopaleshwar Shib, Thakur, &c., party defendants in it, and are those idols properly represented in this suit?

4th—Is the Raja defendant misdescribed in the amended plaint? If so, whether the suit can proceed against him or not?

5th—Is any portion of the plaintiff's claim barred?

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6th—Was the money claimed *bona fide* spent for the benefit of the idols or for protection of their estate? If so, is plaintiff entitled to recover that money from the debutter estate?

7th—Who among the defendants would be considered upon the construction of the will of the late Babu Jaga Mohan Mukerji, *Shebait* of the aforesaid idols, and the representative of their estate on plaintiff's father's death?

On September 14, 1901, the Subordinate Judge, with reference to the 7th issue, ruled that the appellant should be held, as the *Shebait* of the said *Thakurs*, entitled to represent the debutter estate, sought to be charged in the suit, and that the suit should proceed against him, the same against the remaining defendants being dismissed. On February 10, 1902, judgment was delivered by the Subordinate Judge on the other issues, the first five of which he decided in favour of the respondents, holding, upon the 5th issue, that S. 22 of the Limitation Act had no application to the amendment ordered, and that the claim was not barred. As to the 6th issue he directed that the accounts filed by the respondents in support of their claim should be inquired into by two commissioners, who should report their opinion as to the appellant's liability as *Shebait* in respect thereof. On March 16, 1903 the Commissioners submitted their report to the Subordinate Judge stating that in their opinion Rs. 49, 139-3-7 was due to the respondents from the debutter estate. Both parties filed objections to that report, and on June 30, 1903, the Subordinate Judge delivered his final judgment and held that the amount, found by the Commissioners to be due, should be reduced to Rs. 45, 960-11-10, and that that sum was recoverable from the debutter estate then in the hands of the appellant as its *Shebait*. A decree was drawn up on the same day giving effect to that judgment.

Both parties appealed to the High Court. On February 24, 1905, the High Court affirmed the decree of the Court below and dismissed the appeal and the cross-appeal with costs. The High Court held that that Court was not at liberty to entertain the point taken by the appellant to the effect that the order of remand made by the High Court on November 28, 1900, was *ultra vires*, but must deal with the case from the point at which it was left by the Divisional Bench, which made that order,' and

1. (1905) I.L.R. 32 C. 582 at p. 596.

that the suit against the appellant as *Shebait* was not barred by limitation, having regard to S. 32 of the Code of Civil Procedure and S. 22 of the Limitation Act, inasmuch as the amendment of the plaint and the addition of the appellant in his capacity as *Shebait* of the debutter estate did not constitute the addition of a new defendant. With regard to the question of the extent of the liability of the debutter estate, the learned Judges found that, after dealing with all the important questions raised before them, there was no just reason to interfere with the decree pronounced by the Subordinate Judge. See *Peary Mohan Mukerji v. Narendra Nath Mukerji.*[1]

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Against the decree of the High Court the appellant appealed to His Majesty in Council.

Sir *Robert Finlay*, K. C., and *De Gruyther* K. C., (*A. M. Dunne* with them), for the appellant:—On November 28th, 1900, the learned Judges of the High Court held that they had, under Ss. 582 and 53 of the Code of Civil Procedure (Act XIV of 1882), to allow the amendment of the plaint, and remanded the suit. But looking to Ss. 562, 564, 565, and 566 of that Code, the High Court had not the power to remand the case, but only to send down an issue or issues for trial. The amendment changes the character of the suit. The High Court itself says that it sends the case down for 'fresh trial.' The order of remand granting the respondents liberty to make the amendment to their plaint and to proceed to a fresh trial was *ultra vires* and erroneous. On its findings the High Court ought to have dismissed the suit and ought not to have remanded the same.

Before the amendment on July 8th, 1901, the appellant was a defendant in the suit in his personal capacity. But after the amendment he was made party thereto in quite a different capacity, as *Shebait*. Bijoy died in January, 1894, and the claim against the appellant as *Shebait* was made on July 8th, 1901. The period of limitation is either 3 years under Art. 57 or 6 years under Art. 120 of the Limitation Act (XV of 1877). The suit is, therefore, barred under S. 22 of the Limitation Act.

A *Shebait* has not the legal property in the endowment, but only the title of manager of a religious endowment: *Maharanee*

(1) (1905) I. L. R. 32. C. 582.

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Shibessouree Debia v. *Mothooranath Acharjo.*[1] His position is exactly like that of the manager of an infant's estate. As regards the claim relating to money paid in respect of Government revenue, the amount so paid may be a charge on the debutter property, if it is paid for the preservation of that property, even if it exceeds the income. But the expenses stand on a different footing. The *Shebait* ought not to spend more than the actual income, and when the expenditure exceeds the income received, the excess cannot be a charge on the property. The lower Courts ought not to have allowed items of expenditure exceeding the actual income. Again, the previous litigation was of a personal character, and it had nothing to do with the debutter property. The cost of such litigation is not a legal necessity and ought not to have been decreed. The suit should be dismissed as it is barred by limitation, or, in the alternative, the decree should be amended by disallowing all items relating to expenditure in excess of the income and the cost of previous litigation.

Arthur Cohen, K. C., and *G. E. A. Ross*, for the respondents, were not heard.

The Judgment of their Lordships was delivered by

Lord Macnaghten :—This is an appeal from a decree of the High Court of Calcutta affirming a decree of the Subordinate Judge of Hooghly.

In the Court of First Instance the present respondents were plaintiffs. The suit was brought by them as executors of Bijoy Krishna Mukherji, who was *Shebait* of a *debutter* estate for nearly 4 years, to recover Rs. 77,964-9-6 alleged to be due to him in that capacity, either from the estate or from the principal defendant, the present appellant, personally.

The history of the litigation is shortly as follows :—

Jaga Mohan Mukherji, who died in 1840, by will dedicated certain properties to the *Sheba*, or worship, of two Thakurs, or idols, the annual celebration of Durga Puja and other pious acts, and provided for the order of succession to the office of *Shebait* among his own descendants.

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1 (1869) 13 M. I. A. 270, at p. 273.

The first *Shebait* was the appellant's father. He was succeeded by his step-brother, who died in September 1890. On his death the succession opened to Bijoy Krishna Mukherji.

Bijoy's succession was opposed by the present appellant, who threw every possible difficulty in the way of his obtaining possession of the estate and collecting the rents.

Finally Bijoy brought a suit, No. 40 of 1892, in the Court of the Subordinate Judge of Hooghly, to establish his title to the office of *Shebait* under the testator's will.

On the 29th of January 1894, the Court decided in Bijoy's favour. Bijoy died on the day on which the decree was made. By his will he appointed the present respondents his executors, and on the 2nd of March 1894, they obtained probate.

On the 25th January 1897, the respondents brought the present suit against the appellant, who had been appointed receiver of the *debutter* estate both in his capacity of receiver and in his personal capacity. All the surviving descendants of the original testator were made defendants. The respondents, as plaintiffs, alleged that, owing to the interference of the appellant and his persistent opposition, Bijoy was not able to recover more than Rs. 4,607 odd during his incumbency, while he was compelled to spend Rs. 71,572 odd out of his private funds in protecting the *debutter* estate and performing his obligations as *Shebait*, and that after Bijoy's death they had to pay a further sum on account of the debts of the estate. In the result they claimed the sum of Rs. 77,964-9-6 from the estate, or in the alternative from the appellant personally.

The appellant defended the suit, alleging, among other things, that the claim was barred by limitation, and that neither he nor the estate was under any liability to Bijoy's executors.

On the 17th February 1896, the Subordinate Judge made a decree determining that the claim was not barred by limitation. He held that the appellant was liable personally so far as he had realized moneys belonging to the estate, and that, as regards the rest of the claim, the *debutter* estate was liable for such costs and losses as on enquiry by a commission should be found to be reasonable. The appellant appealed to the High Court. On the 28th of November 1900, the High Court held that the claim against

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the appellant personally could not be maintained. As regards the rest of the claim the learned Judges were of opinion that it was not barred. But, although every possible claimant to the office of *Shebait* was a party to the suit, they thought that the *debutter* estate was not properly represented, and they remanded the suit in order that the prayer of the plaint might be amended, so as to raise directly the question as to the right to the office of *Shebait*, and the representation of the estate.

On remand, the Subordinate Judge came to the conclusion that the appellant must be considered to be the *Shebait* and, as such, the proper person to represent the estate. He directed that two Commissioners should be nominated to enquire into and report upon the expenditure in question with liberty to state their own opinion in regard to the liability of the appellant as *Shebait*.

On the 16th of March, 1903, the Commissioners so appointed submitted their report. After a detailed examination of the several matters referred to them, they stated that, in their opinion, the sum of Rs. 49,139 odd was due to the plaintiffs. Both parties filed objections. On the 30th June, 1903, the Subordinate Judge delivered his final judgment to the effect that the amount found due by the Commissioners should be reduced to Rs. 45,960-11-10. He held that that sum was recoverable from the *debutter* estate, then in the hands of the appellant as *Shebait*.

Both parties again appealed. On the 24th of February 1905, the High Court affirmed the decree of the Subordinate Judge and dismissed both the appeal and the cross-appeal with costs.

From that order the appellant has appealed to His Majesty in Council.

On the hearing before this Board the learned counsel for the appellant raised two points. They contended (1) that the suit was barred by limitation and (2) that the estate of Bijoy was not entitled to be reimbursed out of the *debutter* estate expenditure incurred by Bijoy as *Shebait* in excess of his actual receipts from the property.

As regards the first question their Lordships are of opinion that the appropriate period of limitation is the period of six

years from the date of Bijoy's death, and that the suit, therefore, was instituted in time, inasmuch as the amendment directed by the High Court did not alter the character of the suit and no new defendant was brought on the record. The object of the amendment was to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered *Shebait*.

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As regards the question of reimbursement, it is quite clear, and indeed it was hardly disputed, that Bijoy's estate was entitled to be reimbursed all sums properly expended by him in the preservation of the trust estate, as for instance all moneys paid in respect of Government revenue and the like. It is equally clear that Bijoy's estate is entitled to be reimbursed all moneys properly expended by him in defending his position as *Shebait*, which was challenged unsuccessfully by the appellant. If any authority is wanted for this proposition it will be found in *Walters* v. *Woodbridge*[1].

As regards the other items of expenditure, their Lordships are of opinion that Bijoy's estate is entitled to be reimbursed all moneys properly expended in performing the obligations imposed upon him by the original testator's will. The right of indemnity, as has often been said, is incident to the position of a trustee. The liability in respect of that indemnity is the first charge on the trust estate. The only question is, was Bijoy, as trustee, justified in incurring the expenditure for which his executors now claim reimbursement? It was contended by the learned counsel for the appellant that Bijoy was not justified in spending, as *Shebait*, more than he actually received, and that he ought to have managed the trust so economically, that at his death, whenever it might happen, there should be no outstanding claim against the trust estate. This objection is somewhat ungracious, if not absurd. There is no foundation for it in the will. The average income of the trust estate on which Bijoy might fairly have calculated was Rs. 10,000 a year. During the whole period of his incumbency he received less than Rs. 5,000. The dimunition of income was due entirely to the appellant's wrongful acts. It was not unreasonable to expect that, on the cessation of those acts or on the interposition of the Court which Bijoy invoked,

1. (1878) L.R. 7 Ch. D. 504.

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the income would be sufficient to defray the expenditure incurred in the meantime in maintaining the religious observances prescribed by the founder of the trust.

Their Lordships see no reason to differ from the High Court. They will, therefore humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

T. L. Wilson and Co.—Solicitors for appellant.

Watkins and Lampriere.—Solicitors for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.]

Present:—Lord Macnaghten, Lord Atkinson, Lord Collins, Lord Shaw and Sir Arthur Wilson.

Musammat Lal Kumar ... Appellant.

v

Chiranji Lal ... Respondent.

Musammat Lal v. Chiranji Lal.

Advocacy—Advocate forcing his opponent to produce his own client to enable him to cross-examine that client—Suit setting up adoption—Non-production of account-books connected with the ceremony—Burden of proof—Evidence, oral—Appreciation.

The species of advocacy tolerated by the Courts of Law in India, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he himself may have the opportunity of cross-examining that client, is a vicious practice, unworthy of a high-toned or reputable system of advocacy. Such advocacy must embarrass and perplex judicial investigation, and it is to be feared, too often enables fraud, falsehood or chicane to baffle justice.

In the suit the allegation of the respondent, that he was adopted 20 years before the trial, was in issue. The parties were all Bhora Brahmins, who followed the business of money-lending. No effort was shown to have been made by either side to produce the account-books; no search for them or loss of them, was proved; no explanation was given why they were not forthcoming:

Held, that having regard to the well-known and proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book in which anything connected with the ceremony of adoption was entered, covered the respondent's case with suspicion.

Held also the burden of proving the alleged adoption rested upon the respondent and that, on the evidence, he had failed to discharge it.

In the appreciation of oral evidence there is no rule establishing a fixed relation between gains of usury and truth.

Appeal from a judgment and decree of the High Court at Allahabad (November 23, 1905) reversing a judgment and decree of the Subordinate Judge of Aligarh, (August 19, 1904).

(1909) Nov. 3, 4 & 5; Dec. 16.

The question for determination on the appeal was whether the respondent Chiranji Lal was adopted by one Brij Lal as his son.

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The respondent instituted the suit *in forma pauperis*, on August 23, 1903, against the appellant and Musammat Dhan Kunwar, the widow of Brij Lal. The plaint alleged that the said Brij Lal and his eldor brother Tej Ram became separate after the death of their father Jai Kishen; that Brij Lal became the owner in possession of certain property therein specified, and exclusively enjoyed the profits thereof during his life-time; that Brij Lal had no male issue, and, therefore, he took the respondent who belonged to his family, in adoption in his lifetime on April 18, 1889, and performed the adoption ceremonies; that Brij Lal died on February 3, 1890, and the respondent became the absolute owner of the property left by Brij Lal; that after the death of Brij Lal, his widow Musammat Dhan Kunwar applied to the Revenue Court for mutation of names in respect of the Zemindari property on behalf of the respondent on the ground that he was the adopted son of Brij Lal; that Tej Ram, the brother of Brij Lal, filed an objection in that case; that during the pendency of the mutation case, Tej Ram applied to the Court of the District Judge of Aligarh for a certificate for collection of debts, and the District Judge took security from Tej Ram and granted a certificate to him, directing the respondent to establish his claim in a competent Court; that similarly the Revenue Court took security from Tej Ram and effected mutation of names in his favour; that Tej Ram died on June 21, 1898, and after his death the names of his two widows were recorded in respect of the property left by Brij Lal, and after the death of the first widow, the name of the appellant was similarly recorded; that the possession by Tej Ram, his widows and the appellant was unlawful; that Tej Ram and Brij Lal were separate, but if they were members of a joint family, the respondent was entitled to a moiety of the property mentioned in the plaint; that the respondent, who was the adopted son of Brij Lal, was the heir and representative of Brij Lal and was entitled to succeed to the estate of Brij Lal; that Musammat Dhan Kunwar, the widow of Brij Lal, was made a defendant *pro forma*; and that the respondent's age was at the time of the institution of the suit 19 years

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and 2 months; and as no one brought a claim on his behalf during his minority, he instituted the suit after attaining the age of majority. The respondent prayed that by virtue of his right as the adopted son of Brij Lal, he might be put in possession of the property in suit, by dispossession of the appellant.

The appellant in her written statement, denied that the respondent was the adopted son of Brij Lal, and alleged *inter alia* that Tej Ram and Brij Lal were members of a joint Hindu family and, on the death of Brij Lal, Tej Ram became the owner in possession of the entire property as the surviving member of the family, and on the death of Tej Ram his widows entered in joint possession, and the appellant, on the death of her co-widow, became the lawful owner in possession of the entire property; that after the death of Brij Lal, his widow, Musammat Dhan Kunwar, made no application for mutation of names on behalf of the respondent making any mention of adoption, and if Ram Lal, the respondent's father, who having gained mastery over Musammat Dhan Kunwar, got a general power of attorney executed in his favour, took any proceeding of that sort, such proceeding was ineffective as against the appellant; that Ram Lal having met with failure in proceedings in the Revenue Court, and in the Court of the District Judge of Aligarh, caused Musammat Dhan Kunwar to institute a suit, No. 16 of 1902, in the Court of the Subordinate Judge of Aligarh, on the allegation that Tej Ram and Brij Lal were separate, and that Musammat Dhan Kunwar was the owner of the estate of Brij Lal; that in that suit Musammat Dhan Kunwar denied the respondent's adoption, and though that suit was instituted with the advice and knowledge of Ram Lal, no attempt was made by the respondent till it reached the last stage to be made a party thereto; that the said suit was dismissed and the Court held that it had been instituted at the instance of Ram Lal; and that there had all along been ill-feeling between Ram Lal, the respondent's father, and Brij Lal and Tej Ram, and Ram Lal had always been trying to get the property.

Musammat Dhan Kunwar, by her written statement, further pleaded that Ram Lal, the father of the respondent, was her general attorney after the death of her husband, and during the time he held that office, he cunningly made an attempt,

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which was unsuccessful, to establish the adoption of the respondent; and that Ram Lal illegally caused her (Musammat Dhan Kunwar), a *pardanashin* lady, to make a statement before the Tahsildar regarding the respondent's adoption by threatening her with the loss of her life, and by pactising fraud and deception upon her.

The only issue material for the purpose of this report was "whether the plaintiff was the adopted son of Brij Lal."

The Subordinate Judge held that the respondent failed to prove that he was the adopted son of Brij Lal, and dismissed the suit with costs.

On appeal the High Court found the respondent's adoption was proved and decreed his suit with costs.

Musammat Dhan Kunwar died during the pendency of the appeal in the High Court, and the appellant appealed to His Majesty in Council.

H. Cowell and *B. Dube*, for appellant:—There is no documentary evidence of the adoption in this case, and the question entirely depends upon the oral evidence. It is submitted that the onus of proof is on the respondent, and that he has failed to discharge it. Reference was made to *Kishori Lal* v. *Chuni Lal*. [1]

The Court of the First Instance admitted in evidence certain depositions taken in the mutation proceedings. No objection to their admissibility was taken when the learned Judge decided under S. 136 of the Indian Evidence Act (I of 1872) that these depositions were admissible, and received them in evidence, and made endorsements on them as required by S. 141 of the Civil Procedure Code (XIV of 1882). When any document has been admitted, it shall form part of the record of the suit—Civil Procedure Code (XIV of 1882), S. 142 A. No objection to their admissibility can be taken at this stage. Further, it is submitted that they are admissible, and the learned Judge was right in admitting them—*Lakshman Govind* v. *Amrit Gopal*. [2]

[Lord *Atkinson*.—They were not objected to If objection had been taken, they would have been ruled out.]

1. (1908) I L.R. 31 A. 116. 2. (1900) I.L.R. 24 B. 591.

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De Gruyther, K. C., and *G. E. A. Ross* for the respondent :—The adoption was made on April 18, 1889, by Brij Lal, who died in February of the following year. The respondent was only 3 or 4 years af age at the time, and it is, therefore, impossible to have any documentary evidence of the acknowledgment of the adoption or otherwise in any transaction during Brij Lal's life time. There can be only oral evidence. The adoption was set up on the first available opportunity, that is immediately on the death of Brij Lal. This is not a case where the adoption is asserted for the first time after many years after the death of the adoptive father. It is submitted that the High Court was right in holding that the respondent has proved that he was the adopted son of Brij Lal.

It is contended on the authority of *Lakshman Govind* v. *Amrit Gopal* [1] that the depositions taken in the mutation proceedings are admissible in the present suit. But in that case the parties agreed to use such depositions to save the expense and trouble of summoning the witnesses again. There is no such agreement here, and it is submitted that the depositions in question are not admissible. It is also contended that the Tahsildar's finding that there was no adoption should be accepted in the present suit. But the Tahsildar did not have sufficient material before him to decide the question and his judgment should not be accepted in the present suit. Reference was made to the Indian Evidence Act, Ss. 33 and 145; *A. B. Miller* v. *Babu Madho Das* [2]; *Bitto Kunwar* v. *Kesho Prasad Mier* [3]; and *Kissorimohan Roy* v. *Karsukh Das* [4]. Where the two Courts below differ on a question of fact, the appellant must show that the judgment appealed against is wrong—*Jagarnath Pershad* v. *Hanuman Pershad* [5] It is submitted that the appellant here has failed to show that the judgment of the High Court is wrong, and that the appeal should, therefore, be dismissed.

Cowell replied.

The Judgment of their Lordships was delivered by

Lord Macnaghten :—This is an appeal from a judgment and decree of the High Court of Judicature for the North Western

(1) (1900) I. L. R. 24 B. 591.
(2) (1896) I. L. R. 19 A 76 at p. 92.
(3) (1897) I. L. R. 19 A. 277.
(4) (1889) I. L. R. 17 C. 436.
(5) (1909) I. L. R. 36 C. 833.

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Provinces, Allahabad, dated the 23rd November, 905, which reversed the judgment and decree of the Subordinate Judge of Aligarh, dated the 19th August 1904, on a pure issue of fact.

That issue of fact is, whether one Brij Lal, deceased husband of Musammat Dhan Kunwar, now also deceased, adopted Chiranji Lal, the plaintiff and respondent, the son of one Ram Lal.

Tej Ram, the brother of Brij Lal, survived his brother Brij for about eight and a half years, and died on the 21st June, 1898, leaving two widows him surviving, the senior of whom died on the 24th February, 1899, leaving her surviving Musammat Lal Kunwar, who is the defendant in the suit and the appellant in this appeal.

The suit was instituted on the 22nd August, 1903, by the plaintiff, *in forma pauperis*, though his natural father is possessed of some means, against the appellant, Musammat Lal Kunwar, and Musammat Dhan Kunwar, who died pending the appeal, and the property in dispute is not inconsiderable.

The plaintiff alleges that the brothers, Tej Ram and Brij Lal, were separated in ownership of this property, and, as the adopted son of Brij Lal, he claims to recover the whole of the property mentioned in the plaint, or in the alternative, if the ownership is joint, to recover one half of that property. Both defendants contested the suit and pleaded, amongst other things, that the plaintiff was not the adopted son of Brij Lal, and that the two brothers were members of a joint Hindu family.

Brij Lal, his brother Tej Ram, and Ram Lal, the father of the plaintiff, are all Bohra Brahmins, which, it is alleged, merely means that they belong to the Bohra tribe, or brotherhood, whose members follow the business of money-lending,—an astute class, one would suppose, well accustomed to keep books and record events from which large pecuniary results might follow,—and fully alive to the importance of preserving these records, and producing them when engaged in legal controversies in which they might be decisive.

These three Bohra Brahmins, with several other families of Bohra Brahmins, lived in the village of Jatasi. The adoption is

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alleged to have taken place on the 18th April 1889, some ten months before Brij Lal died. He was at that time undoubtedly childless, and much unsavoury evidence was given as to the nature of the malady with which he was affected, and the reason why he despaired of having natural children. The plaintiff was at that time between 4 or 5 years of age. He was married 5 years after his adoption and must, at the time of the institution of the present suit, have been about 20 years of age. There were many important points on which he could have been examined, especially as to a certain extract from the Government Gazette of the North-Western Provinces dated the 25th February 1899, in which it is recorded that one Chiranji Lal, whose father's name is given as Ram Lal, and whose School was given as Muzaffurnagar Government High School, had passed in the 3rd division. The special significance of this entry is obvious from this, that the first time the alleged adoption was put forward in many suits and legal proceedings instituted by these several parties was on the 8th April 1890, under circumstances to be hereafter mentioned. If that entry was framed as information supplied by the plaintiff or his father, Ram Lal, it was most damning to his case, as he is in it described as the son of his natural father. —not of his adoptive father. It was received in evidence without any evidence being given to identify the Chiranji Lal described in it as the plaintiff, and, indeed, before their Lordships, it was urged by counsel on his behalf that *non constat* but that the extract referred to a person other than the plaintiff, but of the same name. The plaintiff, however, was never produced as a witness to sustain his own case and so help to discharge the burden of proof that rested upon him. It is suggested that the presumption which would be drawn in this country to the detriment of a plaintiff who, under similar circumstances, failed to enter the witness box and face the ordeal of cross-examination, ought not to be drawn in cases between natives tried in India, because of a species of advocacy tolerated by the Courts of Law, in that country, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client in order that he himself may have the opportunity of cross-examining that client. The result is that, should the opponent refuse to be led into this trap, the parties (the principal witnesses who

possibly could throw light on all those tangled transactions which so perplex those who have to decide these cases) are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end. This case is a good example of this practice, for not oly was the plaintiff not examined on his own behalf, but the defendant, Mussamat Dhan Kunwar, was not examined on his own behalf either. It is a vicious practice, unworthy of a high toned or reputable system of advocacy. It must embarrass and perplex judicial investigation, and, it is to be feared too often enables fraud, falsehood or chicane to baffle justice. The circumstances under which Mussammat Dhan Kunwar, who is a *pardanashin* woman and illiterate, was examined by the Subordinate Judge are instructive.

After the death of Brij Lal, on the 3rd February 1890, his surviving brother, Tej Ram, applied to the Assistant Collector for a mutation of names for the village formerly enjoyed by Brij Lal, and also made an application to the District Judge of Aligarh for a certificate for the collection of debts on the ground that the property enjoyed by both was joint property. Mussammat Dhan Kunwar resolved to oppose these applications, and on the 24th March 1890, executed a power of attorney in favour of Ram Lal, authorising him, amongst other things, to file an application for the mutation of names in respect of "the ancestral property, the estate of my husband, in order to get my name entered in respect thereof"; and also to obtain from the District Judge a certificate in her favor for the collection of the debts due to her husband. There is no mention whatever of the plaintiff or any right belonging to him, or any reference whatever to the alleged adoption in this lengthy document, but when the proceedings authorised by it are instituted, the petition of objection to the mutation of names purports to be presented by the widow of Brij Lal for herself, and as guardian of Chiranji Lal, her adopted son, of Mauza Jatari. The objection to the application for succession is similarly framed. In each the fact of adoption is stated, no date however being given. In addition to this, the widow Dhan Kunwar, on the 6th May 1890, made a deposition in these proceedings in which she not only swore to the fact of the adoption, but described the ceremony at length. The question of adoption was an entirely irrelevant issue in both these

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proceedings. It was not, and could not have been decided in either of them. It was foreign to the real questions in controversy. It was unnecessary and useless to raise it, unless indeed the real object was to make evidence in support of the adoption. From that point of view it might, though an unscrupulous, have been a sufficiently sagacious and effective step. Ram Lal in his deposition in the present case, dated the 21st July 1904, swore that he acted as general attorney for the widow for three or four years after his appointment; that he made the application of the 8th April 1890, at the request of Dhan Kunwar; that it was at her instance that he mentioned the fact of the plaintiff's adoption; and that she made the statement already referred to in his presence before the Tahsildar. This evidence having been given, and the above-mentioned deposition of Dhan Kunwar having been received in evidence, the Subordinate Judge required the lady to be examined and took her evidence at the house of Babu Sheo Parshad. The part of the evidence dealing with the matter runs as follows:—

I was examined before the Tashildar of Kair. Ram Lal misled me and took me there. Tej Ram said to me that he would not have my name recorded. Then Ram Lal sent Sunder, *naim* (barber woman) to me sending word to me that I should execute a power of attorney in his favor, and that then he would have my name recorded. Then he sent Mussammat Sunder to me for the second time He wanted me to state that I had adopted his son. I said that we had always been on inimical terms. I then went to the house of Ram Lal for the purpose of having my name recorded. Ram Lal took me to the Tashil Court. His wife also accompanied me.

And again:—

I was never on friendly terms with Ram Lal. Chiranji the plaintiff, never came to my house. When I went to the Tashil I was accompanied by Chiranji Lal and his mother, and I stated what he said to me.

This lady was cross-examined by the plaintiff's pleader, but not a question was put to her relative to the account books, which are referred to in her deposition of the 6th May 1890, in these words:—

No account-books of Brij Lal are with me. They must be in my sitting room. I have not gone to the sitting room since my husband's death. I am not literate. I lived in the house of Ram Lal for 6 and 7 days because my *Jeth* Tej Ram, quarrelled with me about this.

And no application appears to have been made to recall Ram Lal, or to examine the plaintiff, then about 16 years of age, or his mother, if she were alive, to refute the serious charge thus

made against them, the charge, in effect, of entering into a conspiracy to procure the commission of perjury for the plaintiff's gain. The history of the account-books is most remarkable. Ram Lal and many other witnesses described in minute detail the recording of the fact of adoption, as well as of the receipts of presents in them. Ram Lal, further stated at the trial that "the assets of Brig Lal, such as goods, papers and ornaments were with Mussammant Dhan Kunwar," and that he employed a pleader for her in the mutation proceedings; but not a question was put to him as to why, at the time when he was managing the suit and putting forward the claim of his son for the first time, he did not search for, examine, or produce the books which, if there be a particle of truth in the whole story told by him and his witnesses, would have terminated the controversy then as now in his son's favour. Dhan Kunwar was not then hostile to his son's claim. On the contrary, it is alleged that it was at her request and by her insistence, that it was put forward. Ram Lal is a hereditary money-lender like all his tribe. He must be well accustomed to keep books, and know the value of written documents. The pleader he then employed must, if the story now told had been detailed to him, have seen the capital importance of the production of these books. Yet he appears never to have asked Dhan Kunwar a single question concerning them. The admission abovementioned of the lady that they were in her sitting room was extracted from her on cross-examination by the Pleader for Tej Ram, her opponent, the man who is sworn by Ram Lall to have been present at the ceremony, and to have signed the entry in the book recording the adoption. No effort was shewn to have been made by either side to procure the production of these books; no search for them, or loss of them, was proved; no explanation given why they were not forthcoming.

Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book in which anything connected with this ceremony was entered, covers the plaintiff's case with suspicion. It was according to the plaintiff's witnesses a memorable event. Wealthy members of the Bohra brotherhood hurried from villages scores of

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miles away to grace the ceremony, as if this child of 5 years old, the youngest of three, sons, were some young potentate coming into his kingdom. There was feasting and music, one witness stating, somewhat boastfully, that one might eat as often as one liked. According to Ram Lal, himself, 125 members of the brotherhood and 100 or 150 others were collected together in this little village of Jatasi; yet none of the inhabitants of the village were produced, on behalf of the plaintiff, to prove that such a gathering ever took place, while if the story of the numerous witnesses resident in the village and its vicinity, examined for the defendants, be true, this host of people must, like some invisible spirits of the night, have assembled and dispersed unseen. The next matter which throws suspicion on the plaintiff's case is this. On the 15th May 1890, the officiating District Judge of Aligarh had made on order granting a certificate of succession to Tej Ram, and refusing to decide the issue raised in that proceeding as to the adoption. On the 18th September 1890, the Assistant Collector made, in the mutation proceedings, an order refusing to decide the same issue and ordered the name of Tej Ram to be entered in the village papers in the place of Brij Lal. On the 19th September 1891, an application was made to the Subordinate Judge of Aligarh, that Dhan Kunwar be appointed guardian of the plaintiff in a suit brought by Ram Lal against Chiranji Lal and others, and an order was made that summonses for final disposal of it should be issued to the defendants directing them to attend in person or by pleaders on the 23rd November 1891, and also directing that they should put in a written statement by the 17th November 1891. On the 29th September, ten days after, the summons was issued in the suit, then entitled *Ram Lal* v. *Mussammat Dhan Kunwar*, widow, and Chiranji Lal, minor, under the guardianship of his mother, Mussammat Dhan Kunwar, residents of Jatasi, defendants; from which it appears that the suit was brought to recover a sum of Rs. 1,092-6-11, but in respect of what cause of action is not stated.

The further proceedings in the case are not printed in this record, but it would appear from an order dated the 15th October 1898 (four months after Tej Ram's death), made by the Subordinate Judge of Aligarh in the Original Suit (158 of 1891) already mentioned, that a decree for the sum sued for had been obtained

against the defendants, who are described as judgment-debtors, Ram Lal being described as decree-holder ; that some objection had been made by the judgment-debtors ; that it was such an objection as, in the opinion of the Judge, should not be made by the judgment-debtors, and gave rise to the suspicion that there was collusion between the objector and the judgment-debtors. Who the objector was does not appear, but the same Subordinate Judge, in his judgment delivered on the 17th November 1912, in a suit instituted by Dhan Kunwar against Lal Kunwar, states that after Tej Ram's death, Ram Lal obtained a decree in this suit and applied to attach under it a certain door frame and door leaves of a house, alleging them to be the property of her son (the plaintiff) in virtue of the alleged adoption. Dhan Kunwar was never asked a question about these proceedings when produced in the present trial. At the end of her cross-examination by the plaintiff's pleader, the plaintiff himself was invited by the Subordinate Judge to ask her any questions he might desire to ask, when he replied, " sufficient questions have already been asked." The only account given of this litigation by Ram Lal himself is that he instituted the suit for profits due to himself, that he was a co-sharer in the property, and paid Rs. 3,000 a year as revenue, but it is evident that, while Dhan Kunwar enjoyed the property of her late husband in virtue of her right as his widow, she ought to have paid the appropriate share of the revenue, and the plaintiff incurred no personal responsibility for it. The introduction of his name was, therefore, quite unnecessary, and there is too much reason to suspect that the whole proceeding was simply an attempt to manufacture evidence.

Ram Lal, in his deposition made on the 7th September 1899, stated that the plaintiff was then being educated at Muzaffarnagar. Had the latter been produced as a witness and cross-examined on the contents of the Gazette of the 25th February 1899, which was filed on behalf of Lal Kunwar in the liligation of 1899—and its existence is thus well-known to him—he might have possibly been able to explain who was his school fellow and namesake who had a father of the same name as his own.

And if he had been obliged to confess that the person mentioned in the Gazette was no other than himself, it would have put on end to the suggestion that he passed amongst his friends,

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associates and neighbours as the adopted son of Brij Lal—heir to what was for him comparative affluence. Numbers of witnesses were produced on his behalf at the trial to prove that he was recognized amongst the brotherhood as the adopted son of Brij Lal and several others were produced by the defendant, to prove that he was not so recognised, but no evidence whatever was given to shew that he was ever regarded in his own village, at Muttra, or where he lived and was at school, as the son of Brij Lal. In the 10 years which elapsed from 1889 till 1899, his name never appears in any document as the latter's adopted son, save only in the documents prepared under the supervision of his own father.

These are the broad facts of the case. At the hearing several depositions made in previous suits by witnesses examined in the present suit were admitted in evidence without the necessary foundation for their admission having been laid. The most vital points were not elucidated. The most suspicious circumstances were not probed. The most important and decisive documents were not produced. Much discussion was devoted before their Lordships, as well as in the Indian Courts, to petty discrepancies between the evidence of the different witnesses examined for the plaintiff; for instance, as to which of the three pundits alleged to have been present at the ceremony of adoption, presided, and which assisted, or as to whether the ceremony and the receipt of the presents were recorded in two books or only in one, and such like. In the High Court much comment was directed to the question of the relative credibility of a Bohra money-lender who had amassed many tens of thousands of Rupees in his business and of a Bohra money lender who in the same business had not been so fortunate, as if there were some fixed relation between the gains of usury and truth. Due weight, however, does not appear to have been given to the conduct of the plaintiff; the improbability and inconsistency of the story told on his behalf; his absence from the witness chair; and the non-production of all books or documents. The conduct of the trial was, on the whole, eminently unsatisfactory. The Subordinate Judge decided, as a fact, on the evidence before him, that the plaintiff had not been adopted. The High Court, on the same evidence, decided that he had been adopted. Their Lordships do not accept either of these conclusions. It appears to them that the sounder view lies between

these two extremes. The burden of proving that the alleged adoption took place 20 years before the trial rested upon the plaintiff. They are clearly of opinion that he has failed to discharge it. Musammat Lal v. Chirapji Lal

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Judge dismissing the action restored.

The respondent will pay the costs of the appeal.

Ford Ford and *Cherta* for appellant.

Barrow, *Rogers* and *Nevill* for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Thakur Nawab Ali v. Wahid Ali.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present:—Lord Macnaghten, Lord Atkinson, Lord Collins, Lord Shaw and Sir Arthur Wilson.

Thakur Nawab Ali Khan .. .. Appellant*

v.

Wahid Ali .. .. Respondent.

Oudh Talukdar and his relatives—Superior proprietor—Sub-proprietor—Provision for maintenance—Rule of the British Indian Association of Oudh—Construction—Suit in a rent Court—Jurisdiction—Maintenance, payment made on account of.

Where in Oudh sub-proprietary rights in a village were held by the relatives of a Talukdar, who held superior proprietary rights in it, under the provision for maintenance in accordance with one of the Rules of Practice, framed by the British Indian Association with regard to suits instituted and decrees passed therein, dated the 23rd September 1867, *viz.*, 'This class will remain in possession of what they actually had at annexation or rent-free" during their life time-but subject to payment in the second generation of 25 p. c., to the Talukdar, and in the third 50 p. c., and will not have transferable rights. If such persons pay the Government Revenue, plus 10 p. c. to the Talukdar, they will have heritable rights in addition."

Held, that the bulk sum out of which the percentages were to be struck was the assumed rental, of which 50 p.c was the Government Revenue.

Held, also, that it was not within the province of a Rent Court to determine whether maintenance was or was not payable; and consequently that certain payments made on account of maintenance to the respondent by the Court of Wards' which represented the appellant during his minority, could not be opened up by the appellant in suit brought in a Rent Court by him after he attained his majority.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh (March 27, 1906) varying a judgment and decree of the Court of the Deputy Commissioner of Sitapore (September 9, 1905),

Thakur Nawab Ali v Wahid Ali.

The principal question to be determined in the appeal was the right construction of one of the rules [1] made by the British Indian Association of Oudh in the year 1869.

One Fozl Ali, the father of the appellant, was the Talukdar of Akbarpur. After the grant of Talukdari Sanad to him, his brother, Mehdi Ali, claimed in the year 1869 a share in the Taluka, or, in the alternative, maintenance. The matter in dispute was referred to the British Indian Association, which made an award based upon a compromise between the parties. The result of the proceedings, which were confirmed by the Financial Commissioner, was that Mehdi Ali was granted for maintenance the village of Daryapur, one of the villages in the Akbarpur Taluka, and an allowance of Rs. 700 per annum.

Mehdi Ali died on November 21, 1881, and was succeeded by his daughter Abadi Begum, the mother of the respondent.

On the death of Fozl Ali in 1888, his estate was taken over by the Court of Wards on behalf of his minor son, the appellant.

In October, 1893, the Court of Wards, representing the appellant, sued Abadi Begum in the Rent Court for arrears of rent of the village of Daryapur for the years 1298, 1299, and 1300 Fasli, and obtained a decree against her. In November, 1894, Abadi Begum instituted a suit in the Court of the Subordinate Judge of Kheri against the Court of Wards representing the appellant for a declaration that she was entitled to the entire rental of the village Daryapur and was not liable to pay anything to the Talukdar in the shape of rent, or Talukdari dues. That suit was finally disposed of by a judgment of the Court of the Judicial Commissioner of Oudh, dated the 9th of May, 1898, and the decree made in pursuance of that judgment was in the following terms :—

"It is hereby declared that Abadi Begum, the plaintiff, succeeds to the rights of Mehdi Ali Khan in the village Daryapur subject to the payment of one half of the Government Revenue plus 10 per cent Talukdari dues."

In May, 1899, the Court of Wards, acting on behalf of the appellant, again sued Abadi Begum in the Rent Court for arrears of rent, on account of the village Daryapur for the years 1303, 1304, 1305 and 1306 Fasli. That claim was made and decreed at the rate settled by the Court of the Judicial

(1) A translation of the rule is set out in the Judgment of their Lordships below.

Commissioner by its decree dated the 9th May, 1898, and on appeal by Abadi Begum tothe Court of the Judicial Commissioner, the decision of the lower Court was upheld.

Abadi Begum died in February, 1902, *i.e.*, after *Kharif* 1309 Fasli, and was succeeded by her son, the respondent.

The Taluka was released from the management of the Court of Wards on May 9, 1904, and on June 19, 1905, the appellant instituted the present suit against the respondent in the Court of the Deputy Commissioner of Sitapur for arrears of rent due on account of the village Daryapur from 1309 to 1313 Fasli. The claim was made under the Oudh Rent Act (No. XXII of 1886), S. 108, clause 2, and the amount claimed was Rs. 8,253-13-3. The plaint alleged that the village Daryapur was included in the Taluka Akbarpur, and the appellant held superior proprietary rights in the village, which came into the possession of the respondent on the death of his mother Abadi Begum; that, in accordance with the decision of the Court of the Judicial Commissioner, dated the 9th of May, 1898, and the Rules of the British Indian Association, the appellant was entitled to get Rs. 25 per cent, on the *nikasi kham* (gross income) of the village Daryapur, and Rs. 10 per cent. *malikana hag* (right to *malikana*) besides certain specified rates, up to the death of Abadi Begum; and Rs. 50 per cent. on the gross income, and Rs. 10 per cent. of the *malikana*, besides the said rates, after her death.

The respondent in his written statement of defence pleaded that he was only liable to pay one half the Government Revenue plus 10 per cent. thereon as decided by the Court of the Judicial Commissioner on the 9th May, 1898, and he further claimed to set off against the rent the sum of Rs. 700 per annum awarded as maintenance to Mehdi Ali.

Of the five issues framed by the Deputy Commissioner it is necessary to state here only the following :—

1. For *Kharif* 1309 Fasli, is defendant liable to pay to plaintiff one-half the Government Revenue for that *kist*, plus 10 per cent. *malikana* on the Government Revenue for that *kist*, plus local rates and cesses (as defendant alleges); or ½ of the full rental demand for that *kist* plus *malikana* and rates and cesses (as plaintiff alleges)?

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2. From Rabi 1309 Fasli to Rabi 1312 Fasli, both inclusive, (3½ years) is the defendant liable to pay plaintiff only ½ the Government Revenue, plus 10 per cent *malikana* on the whole Government Revenue (not on the half), plus local rates and cesses (as defendant alleges); or ½ the whole rental demand for the 3½ years, plus 10 per cent. *malikana*, plus local rates and cesses, which plaintiff claims to be due under British Indian Association Rules, or what?

3. Has the Court of Wards which managed the property in 1309, 1310 and Kharif of 1311 Fasli allowed defendant a set-off—against what may have been due from him for rent—of the *guzara* or *nankar* of Rs. 700 per annum? If so, can that set-off be now held null and void?

On the first issue the Deputy Commissioner held that the respondent was liable to pay to the appellant for the second half 1309 Fasli, one-half the Government Revenue for that instalment, plus 10 per cent *malikana* on such Government Revenue, plus local rates and taxes. On the second issue he found that, from the first half of 1309 Fasli to the first half of 1312 Fasli, both inclusive, the respondent, being in the third generation, was liable to pay to the appellant the whole Government Revenue for Daryapur, plus local rates and taxes, but without the addition of any 10 per cent. *malikana*. On the third issue he held that the Court of Wards had allowed the respondent a set off in 1309 Fasli and in 1310 Fasli, on account of the allowance above mentioned, and that that set off could not be held to be null and void. On September 9, 1905, a decree for Rs. 2,853-9-0 with proportionate costs on the amount decreed was made in favour of the appellant.

Both the appellant and the respondent appealed against that decree to the Court of the Judicial Commissioner of Oudh. That Court dismissed the respondent's appeal with costs, and on the appellant's appeal it held that in the years 1310 to 1312 Fasli, 80 per cent. on the Government Revenue should be allowed. The amount of the decree of the First Court was therefore increased by Rs. 285 with proportionate costs in both Courts, but as regards the rest of the claim of the appellant, his appeal was dismissed with costs.

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The appellant, therefore, appealed to his Majesty in Council.

G. E. A. Ross, for appellant.—The words *jama sarcar* in the original are translated as meaning "Government Revenue." But *jama* means revenue, that is to say, rent, and *sarcar* here means any superior proprietor, *i. e.*, the Talukdar in this case, and not the Government. The true meaning of those words is the amount of rent payable to the Talukdar. The rent payable to the Talukdar should be ascertained each year, and the 25 or 50 per cent. referred to in the rule under consideration must be taken as the 25 or 50 per cent. of the rent due to the Talukdar for that particular year. Thus on the true interpretation of the rule the appellant is entitled (*a*) to 25 per cent. of the rental for the second half of the year 1309 Fasli; (*b*) to 50 per cent. of the rental (*nikasi kham*) for the years 1309 to 1312 Fasli.

Rs. 700 per annum payable to Mehdi Ali as maintenance was only an allowance payable to him during his life-time. It was not a heritable allowance and came to an end on the death of Mehdi Ali. The Court of Wards gave Abadi Begum credit for that allowance in the accounts against what was due from her for rent for the village Daryapur. The Court of Wards was wrong in giving Abadi Begum credit, and the appellant is entitled to claim that any credits wrongly given should be treated as null and void.

De Gruyther, K. C., and *S. A. Kyffin*, for respondent :— The case of an under-tenant as regards the rent payable by him to the Talukdar, the superior-proprietor, is dealt with under the Oudh Sub-Settlement Act (No. XXVI of 1866). But where the estate was divisible but was not actually divided, and the estate stood in the name of the Talukdar, Act XXVI of 1866 did not deal with the relationship between the Talukdar and the persons interested in the estate jointly with the Talukdar, as regards the rent payable by the latter to the former. Such cases come under the Rules of the British Indian Association. The word 'rental' has a technical meaning in settlement proceedings. It means the rental as ascertained by the Settlement Officer for the purpose of calculating the Government Revenue, which is 50 per cent. of this technical rental. The percentages referred to in the Rule are the percentages of this technical rental, and not of the rent due to the Talukdar as contended by the appellant.

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The Talukdar must pay the Government Revenue, even though his sub-proprietor or under-tenants fail to pay him anything; and the extra 10 per cent. of the Government Revenue was added to protect the Talukdar, who took some risk. Reference was made to a Compendium of the Law specially relating to the Talukdars of Oudh by J. G. W. Sykes, pp. 285 and 310; the Oudh Sub-Settlement Act (No. XXVI of 1866); and the unreported case of *Gapaltar Singh and others* v. *Ram Rattan Lal*, Appeal No. 78 of 1897, decided on March 10, 1898, by the Court of the Judicial Commissioner of Oudh, showing that the actual rentals collected vary, and that the assumed rental is double the Government Revenue.

The allowance of Rs. 700 per annum was transferable and heritable and was properly set-off by the Court of Wards Further, this suit is brought in a Rent Court, which cannot consider this question.

The Judgment of their Lordships was delivered by

Lord Shaw.—The question between these parties can be stated in short compass. The plaintiff (appellant) is Talukdar of Akbarpur within which is included the village of Daryapur. As such Talukdar he holds superior proprietary rights in the village.

The defendant (respondent) holds, under the "provision for maintenance" which falls to be construed, the sub-proprietary rights in the village. His mother, Abadi Begum, enjoyed such provision for maintenance, being a sub-proprietor in the second generation. The plaintiff holds similar rights, being a sub-proprietor in the third generation. The payments due from these sub-proprietors to the Talukdar are, it is admitted, governed by the terms of the provision for maintenance.

The document so falling to be construed is of some interest. It is a translation by the Court translator of "Copy of Rules of Practice framed by the British Indian Association with regard to suits instituted and decrees passed therein" dated the 25th September 1867. Under it "the Talukdars agree to make the following provisions for the maintenance of their relatives provided that their doing so be sanctioned by the Government and be considered as a final disposal of the question in the classes of cases detailed below." The Officiating Chief Commissioner at Fyzabad

dealing with its terms states: "I think they are in every way as liberal as we could expect to obtain for the relatives of the Talukdar." It is plain that the statement of the very important questions of the title to and interest in the land of their portion of India was thus put upon a substantial and permanent foundation, and the decisions of the questions in this case, involving a construction of this portion of these Rules of Practice framed by the British Indian Association, has been represented to their Lordships as of general importance. The provision for maintenance, which it is agreed by the parties applies and falls to be construed, is, in the language of the translation, as follows:—

This class will remain in possession of what they actually had at annexation "rent-free" during their lifetime, but subject to payment in the 2nd generation of 25 p.c. to the Talukdar, and in 3rd 50 p.c., and will not have transferable rights. If such persons pay the Government Revenue, plus 10 p. c. to the Talukdar, they will have heritable rights in addition.

It is, of course, fundamental to ascertain what is the bulk sum out of which these percentages are to be struck. The Government Revenue is 50 p. c. in such bulk sum. For this and its regular payment the Talukdar is responsible. The Government valuation is made at intervals of thirty years and is struck, not, of course, upon the actual receipts for a particular year, but upon an assumed rental which represents the fair average of the Talukdar's annual receipts. A fixed datum is thus arrived at for the payment of Government Revenue. From the documents produced in this case it is manifest that the actual receipts of rental vary greatly from year to year and that, were the Government Revenue to be fixed upon this varying basis, the greatest difficulties would emerge in administration. And, so far as the Talukdars are concerned, it appears to be much in their interest that the charges upon their property should be upon fixed basis.

If the provisions for maintenance of relatives agreed to by the Talukdars and sanctioned by the British Indian Association are upon the same fixed basis, then all parties, including relatives, the Talukdars, and the Government, can understand year after year, and be able to forecast, their exact financial position.

Taking it accordingly that the Government Revenue is 50 p. c. of the assumed rental; that the provision for maintenance of relations

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in the 2nd generation is the enjoyment of the property subject to a payment of twenty-five p. c. of the assumed rental to the Talukdar; and that in the 3rd generation the enjoyment of the property is subject to a payment of 50 p. c. to the Talukdar, the result would simply be that in the 3rd generation the sub-proprietor in actual possession would relieve the Talukdar of the Government Revenue which is the very same sum, *viz.*, 50 p. c. of the assumed rental. They would, however, according to the rule, as applicable to the provision for maintenance of a perpetual or limitable character, pay to the Talukdar an additional sum of 10 p. c. As the payments to the Talukdar might not be regular, and, in any view the Talukdar's responsibility to the Government is full and direct, whether he received such payments or not, this 10 p. c. may be accounted for as a reasonable commission or insurance, and is accordingly sanctioned by the Rules of the British Indian Association under construction, as well as by the rules regarding the sub-settlements and other subordinate rights of property in Oudh, scheduled to Act No. XXVI of 1866.

The whole of the above depends upon the fundamental bulk-figure being the assumed rental as described, and if that bulk figure be so treated, it does not appear to their Lordships that there is much left to construe in the rule.

The Talukdar—the plaintiff-appellant in the present case—however, maintains that what ought to be paid by the relatives of the 2nd and 3rd generations is not 25 p. c. and 50 p. c. respectively of the bulk figure mentioned, but of the actual rent for the particular years, and not yearly of the rents as received or ingathered for these years, but of the amount of the rents demandable, whether received or not. Certain contentions were put forward as to an alleged mistranslation of one clause in the rule. That clause reads :—

" If such persons pay the Government Revenue, for his ten p. c., to the Talukdar they will have heritable rights in addition."

It is said that the words translated "Government Revenue " really mean any payment to a superior such as the Talukdar and that accordingly the translation should read " if such persons pay (not the "Government Revenue" but) the amount due to the Talukdar plus 10 p.c. to the Talukdar, they will have heritable rights." It is somewhat difficult to follow such an argument, and the

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proposed correction would appear to confuse, rather than to clarify, the clause. But it is not necessary in their Lordships' opinion, to make any separate pronouncement on that subject. The basis of the rule would, in any view, fail to be arrived at; and their Lordships have little doubt that the assumed rental which is used in fact for the Government purpose is, by the rule, meant to be used for maintenance purposes. The Court below—*viz.*, the Court of the Judicial Commissioner of Oudh—has pronounced a decree upon this footing and their Lordships are of opinion that the decree is sound.

Their Lordships do not think that the claim of the Talukdar for a contribution of 25 p. c. and 50 p. c. respectively of the rents demanded for the years in question (plus 10 p. c. in the sense of the rule) can be sustained. Payments on this scale might conceivably far exceed, not only the Government Revenue, but the entire receipts of rental actually obtained for particular years. The rights of the relatives in possession as sub-proprietors might thus be reduced to a shadow, and the provisions for these large classes of society rendered precarious.

A construction which would bring about such a result is not, in their Lordships' opinion, warranted on a sound reading of the terms of the maintenance provision.

Another point was argued. It appears that the appellant, who during his minority was represented by the Court of Wards, objects to certain payments made by that Court on account of maintenance to the respondent. Their Lordships agree with the view taken by the Judicial Commissioner in his judgment of the 27th March 1906 that these transactions cannot be opened up in this case; and, in their Lordships' opinion, he rightly held that "it is not within the province of a Rent Court to determine whether the maintenance was or was not payable."

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for appellant: *Barrow, Rogers and Neville.*

Solicitors for respondent: *T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Kambinayani Javvaji Timmaji Amma Garu and others. .. Appellants* (*Plaintiff and her legal representative*)

v.

Kambinayani Javvajee Subbaraju Nayanivaru and others .. Respondents (*Defendants*).

Timmaji Amma v. Javvajee Subbaraju.

Limitation Act, Art. 144—Adverse possession—Hindu Law—Widow—Compromise by relinquishing rights disputed—Effect of—No alienation.

Plaintiff's father brought a suit against first defendant's father for a third share in the plaint Zemindari, obtained a decree and died before division was carried out in execution. Plaintiff's mother was brought on record as the father's legal representative, but her right to execute was contested. The District Court and the High Court decided in her favour, but leave to appeal to the Privy Council was obtained by 1st defendant's father and stay of execution applied for.

Plaintiff's mother and defendant's father compromised the dispute, by which plaintiff and her heirs were to relinquish all their rights under the decree for a consideration. Plaintiff on attaining majority brought this suit for a declaration that the "alienation" by her mother was invalid and inoperative beyond her mother's life-time and for recovery of a third share of the Zemindari.

Held: That there was no transfer of right by the compromise and that the compromise did not effect an alienation by the mother of rights which she possessed so as to make the possession of the 1st defendant's father a possession derived from her; and that the suit was barred by limitation, as the defendant and his father had been in possession adverse to the plaintiff and her father for over twelve years, no possession having been obtained by plaintiff's father under the decree obtained by him.

Appeal from the decree of the District Court of North Arcot in O. S. No. 9 of 1903.

The Advocate-General (P. S. Sivaswami Aiyar) and *L. A. Govindaraghava Aiyar* for appellants.

P. R. Sundara Aiyar, P. R. Ganâpathi Aiyar and *S. V. Padmanabha Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS :—*Miller* J.—The preliminary objection that the suit was not on behalf of the estate fails. There is nothing in the language of the plaint to which our attention was called

* A. No. 113 of 1905. 1st February 1910.

which rebuts the presumption arising from the nature of the relief claimed, that the suit was on behalf of the estate.

On the merits I have had an opportunity of reading the judgment which my learned brother has prepared, and I agree with him that the compromise does not effect an alienation by the widow of rights which she possessed, so as to make the possession of the 1st defendant's father a possession derived from her. The widow gave up or relinquished her rights and interest and all claim under the decree, but I do not read that as meaning that she transferred those rights, interests and claims to the 1st defandant's father, but only that she undertook to make no further claim under the decree. There is a transfer of property by him to her but none by her to him.

That being so I concur in dismissing the appeal on the ground that the suit is barred by limitation.

Munro J :—This is an appeal by the plaintiff against the decree of the District Court of North Arcot in O.S. No. 9 of 1903. The plaintiff's father brought O. S. No. 5 of 1876 against the father of the 1st defendant, and a compromise was entered into and a decree passed thereon by which one-third of the Kangundi Zemindari and a sum of Rs. 20,000 were awarded to the plaintiff's father. The plaintiff's father executed the decree so far as the sum of Rs. 20,000 was concerned. He also applied in execution for the one-third share of the Zemindari, but died in 1878 before division was carried out. The plaintiff's mother Madamma was brought on record as legal representative. Her right to execute the decree was contested by the first defendant's father, but was upheld by the District Court and by the High Court on appeal. The 1st defendant's father on the 28th October 1881 obtained leave to appeal to the Privy Council and on the 30th March 1882 applied for stay of execution. While matters stood thus the parties came to an agreement and executed Exh. XLI on the 2nd July 1882. Exh. XLI sets out the above facts and goes on to say that in view of the termination of the disputes, in view of the trouble and loss that both parties had been put to, and also in view of the uncertainty of the result of the appeal to the Privy Council a settlement had been arrived at. Under the settlement the 1st defendant's father was to give certain immovable properties to Madamma

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and to the plaintiff who was then a minor, pay Rs.2,500 annually to Madamma and a lump sum of Rs. 57,000 to Madamma and the plaintiff. On their part Madamma, the plaintiff, and her heirs were to relinquish all their rights under the decree in O. S. No. 5 of 1876. The deed then proceeds to say in paragraph 10 that Madamma took possession of the immovable properties and received payment of the Rs 57,000, and relinquished on her own behalf and on behalf of the plaintiff all rights and interest in the decree in O. S. No. 5 of 1876 while the 1st defendant's father and his heirs relinquished all their rights and interest in the matter of Madamma, the plaintiff and their heirs enjoying the properties put in Madamma's possession. It was further provided that Madamma should within twenty days certify satisfaction of the decree in O. S. No. 5 of 1876, and that the 1st defendant's father should withdraw his appeal to the Privy Council and his application for stay of execution. These provisions were carried out. Madamma died in 1885 and the estate was in charge of the Court of Wards till the 11th March 1900. On the 15th March 1900 the plaintiff applied to be brought on record as her father's representative, and to be allowed to execute the decree in O. S. No. 5 of 1876. The 1st defendant contended that as satisfaction had been recorded there was no subsisting decree which the plaintiff could execute. This contention was upheld by the District Court and the High Court, and the plaintiff's application was dismissed. The plaintiff then filed the present suit. She alleged in her plaint that the settlement under Ex. XLI was fraudulent and intended to defeat her rights; that for the consideration set out in Exh. XLI Madamma alienated the property decreed to her father and that as the settlement was without legal necessity and in fraud of her rights the alienation effected thereby was not binding beyond her mother's lifetime. She prayed *inter alia* for a declaration that the alienation was invalid and inoperative beyond Madamma's lifetime, and for partition and recovery of a third share of the Zemindari.

The District Judge found that the plaintiff's suit was barred by *res judicata*, by limitation and by S. 244, Civil Procedure Code (Act XIV of 1882). He also found that the plaintiff had no cause of action. The decision of these questions turned

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mainly upon whether there was an alienation by Madamma of her husband's estate as alleged in the plaint. The District Judge found there was not, and it is to the propriety of that finding that the arguments for the appellant have been mainly directed. *Sheo Narain Singh* v. *Khurgo Koerry* and *Sheo Narain Singh* v. *Bishen Prosad Singh* [1], *Mussamut Indro Kooer* v. *Shaikh Abool Burkat* [2], and *Sant Kumar* v. *Deo Saran*,[3] are relied upon in support of the contention that under the settlement or compromise evidenced by Exh. XLI there was an alienation by Madamma of the property decreed to the plaintiff's father in O. S. No. 5 of 1876. In the first of these cases one Tejmun Singh having died in 1835, his brothers, though divided from him, got their names registered as owners of the estate which had been in his possession till his death and, as is clear from the report see particularly page 345, where it says the brothers got possession in 1835—took possession of at least two mouzahs of that estate. The widow of Tejmun Singh, alleging that he had been divided from his brothers, sued for cancelment of the registration and for confirmation of possession. She succeeded in the first Court, but was defeated on appeal. She then preferred a special appeal, and, while that appeal was pending, entered into a compromise, by which she gave up her claim of having the special appeal heard, and agreed that the heirs of her husband's brothers should remain in possession of the two mouzahs, of which, as above mentioned, they had taken possession, she herself taking the rest of the property for life with reversion to the heirs of the brothers. In 1879, within twelve years after the death of the widow, suits to recover the two mouzahs were brought by the daughters of Tejmun Singh and their assignees, and one of the questions which the High Court had to decide was whether the suit was barred by limitation. The Court held that there was no adverse possession during the life of the widow because "the suit by the widow and the succeeding compromise was tantamount to an alienation by the widow of a portion of the property for her life-time," and that the period of limitation must be counted from her death. With great respect I find

1. (1882) 10 C. L. R. 337. 2. (1870) 14 W. R. 148.
3. (1886) I. L. R. 8 A. 368.

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myself unable to accept this view. In *Radha Mohan Dhar* v. *Ram Das Dey*[1], one Ramkant died leaving immovable property and his widow took possession. The defendant claimed the property and threatened the widow with legal proceedings. The widow thereupon gave up her own title and possession and permitted the defendant to hold the property as part of his estate. The question arose whether the possession of the defendant was adverse to the widow, and it was held that it was. In *Adi Deo Narain Singh* v. *Dukharan Singh*[2], on the death of the widow who was in possession, the person entitled to succeed to the property was the daughter of the last male holder if it was his separate property. The defendants, however, took possession, and it was alleged that the daughter acquiesced in the possession. It was contended that as the defendants held possession with the consent of the daughter their possession was not adverse to her. The argument was held to be fallacious. It was observed that the possession of the defendants was in no way derived from or under the daughter, as she had never obtained possession herself at all, and that the defendants did not maintain their possession in virtue of any title acquired by them through her, by sale, transfer or otherwise. It is pointed out that the two cases just referred to were not cases in which there had been compromise after suit brought. It can, I think, make no difference whether the female gives up her claim before suit or by compromise after suit, unless there is something in the compromise itself to make a difference. In *Gunesh Dutt* v. *Mussamut Lall Muttee Kooer*,[3] there were two brothers. One had a son, Chedee Lall, who died leaving a widow. This widow and the sons of the other brother put in applications under Act XXVII of 1860, the former claiming a life interest in Chedee Lall's estate and the latter claiming the property as joint family property. There was a compromise by which the widow abandoned her claim and admitted the right claimed by the brother's sons. It was contended that the brother's sons were holding with the widow's consent, and that, therefore, their possession was not adverse to her. The Court observed as follows:—" Looking to the proceedings under

1. (1869) 3 B. L. R. 362. 2. (1883) I.L.R. 5 All. 532.
3. (1872) 17 W R. 11.

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Act XXVII it is quite clear that the defendants have never admitted in the slightest degree that they hold under the widow. They alleged, and still allege, a title entirely hostile to her and possession based on that title, and the fact that she, for reasons which we need not consider, chooses to abandon her own claim * * * does not alter the nature of their possession from an adverse to a derived possession. The compromise may be perfectly binding on her, but there is nothing in the terms of it to show that the appellants admitted and acquired her rights * * * * * They bought the widow's silence, but did not attempt to acquire her rights as heiress * * * * In considering whether the possession is adverse, we must see whether it is based on a title derived from the widow as representative of the separate estate or on one which leaves no separate estate to be represented." Now I have no hesitation in holding that the principles upon which the three cases last quoted were decided are correct, and, applying them to the facts in *Sheo Narain Singh* v. *Khurgo Koerry and Sheo Narin Singh* v. *Bishen Prosad Singh*[1] I am constrained to hold that the decision in that case on the question of adverse possession cannot be supported. The possession of the brother's heirs was clearly adverse to the widow, and this being so, their holding could not be regarded as being under an arrangement which in its effect was tantamount to an alienation by the widow. *In Mussamut Indro Koer* v. *Shaikh Aboot Burkat*[2] there was a compromise by which a Hindu widow gave up all her rights in the estate of her deceased husband, reserving only a life interest in part of it, and the question was whether the reversioner was bound by the compromise. It was held that he was not, on the ground that the compromise could not but be regarded as an alienation. Now, there can be no doubt that such a compromise would be binding on the reversioner—*Imrit Kunwar* v. *Roop Narain Singh*[3]— and if, as I think, what the learned Judges meant to say was that the compromise could not affect the rights of the reversioner any more than an alienation could have done, there is no difficulty in agreeing with them. In *Sant Kumar* v. *Deo Saran*,[4] the widow got possession of her husband's property

1. (1882) 10 C.L.R. 337.
2. (1870) 14 W.R. 146.
3. (1880) 6 C.L.R. 776.
4. (1886) I.L.R. 8 All. 365.

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alleging it to be his separate estate. Her husband's brother's son sued her for possession of the property. There was a compromise by which the widow admitted that the family was joint and that she was only entitled to maintenance. In a suit by a reversioner after the widow's death the question arose whether the compromise was binding on the reversioner. It was pointed out that while a decree finally obtained against a widow in a *bona fide* litigation could bind the reversioners, a compromise was not on the same footing as such a decree, and that the compromise then in question could scarcely be regarded as having any footing higher than that of an alienation which the widow in possession of her husband's divided estate could have made. With all this I entirely agree. But it is no authority for saying that the same results necessarily flow from a compromise by a widow as would flow from an alienation by the widow.

Now when we examine the compromise in the present case in the light of the principles indicated above, it is, I think, impossible to hold that there was an alienation by Madamma of one-third of the Zemindari. The effect of the compromise briefly is that for a consideration Madamma agreed not to press her disputed claim to execute the decree and recover the property. There was no admission of her right, no title derived from her. In this view the only other question which need be considered is whether the suit is barred by limitation. Though the plaintiff's father got a decree in 1876 for the suit property he never got possession, nor did Madamma. Even as against the plaintiff's father the possession of the 1st defendant's father was adverse and it having been found that no title was derived by the 1st defendant's father by alienation from Madamma, the property continued to be held adversely by the 1st defendant's father and the 1st defendant up to the date of the suit. The suit is therefore clearly barred by limitation and was rightly dismissed. This appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Miller.

Palamalai Mudaliar *alias* Palamalai Pillai.. Appellant*
(*Defendant*

v.

The South Indian Export Company, Ltd... Respondents
(*Plaintiffs*).

Palamalai Mudaliar v. The South Indian Export Compy., Ltd.

T. P. A., S. 53—Conversion of land into cash to defeat creditors—Transferee's good faith—Onus—Discharge of mortgage with purchase-money—Lien of transferee.

A transfer of immoveable property effected by the vendors with the intention of putting their property beyond the reach of creditors by converting land into cash is voidable under S. 53 of the Transfer of Property Act, but the transferee will be entitled to a charge on the property to the extent to which the purchase-money went towards the discharge of debts secured on the property.

Per *Wallis*, J. :—A sale effected with the mere object of preferring some of several creditors is not voidable under S. 53 of the Transfer of Property Act.

The onus of proving good faith and consideration is on the transferee.

Appeal from the Decree of the Subordinate Judge's Court of Negapatam in O. S. No. 25 of 1905.

P. R. Sundara Aiyar and *K. Srinivasa Aiyangar* for appellant.

The Advocate-General (*P. S. Sivaswami Aiyar*) and *S. Varadachariar* for respondents.

The Court delivered the following

JUDGMENTS :—*Wallis* J.—The question whether the sale in favour of the defendant, Exhibit II, is voidable at the instance of the vendor's creditors depends on the inference to be drawn from a number of circumstances attending the sale. The plaintiffs had obtained a decree in the High Court against Madarsa Rowthar and Sheik Davood on the 21st October 1902. On the 22nd January 1903 a petition was put in for transfer of the decree to the Subordinate Judge's Court of Negapatam for execution, and on the 25th March 1903 and the 26th March 1903 two execution petitions were put in in the Subordinate Judge's Court for execution, Exhibits B and B1, praying for the arrest of the defendants in the suit and for the attachment of their properties including the property which is the subject of the present suit. In support of these petitions an affidavit, Exhibit B2, was sworn by the plaintiffs' agent on the 20th March 1903 and filed on the 28th March 1903, in which it was alleged that some of the properties were mortgaged and that the defendants in the suit were trying to sell the scheduled properties, to discharge only the mortgage-debt and to appropriate the balance. The Court ordered the attachment of certain houses but not of the lands, as the

* A. No. 45 of 1907. 1st December 1909.

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Revenue Registers had not been filed; and on the 2nd April the plaintiff's agent swore another affidavit, Exhibit B4, stating that the defendants having come to know of the execution proceedings, were, with a view of defrauding the decree-holders, selling the lands in Ottathattai village to the present defendant, that the stamp paper had been purchased, and that the sale deed was being written. The affidavit was filed on the 3rd April 1903. As to the fact of the sale the deponent's information was correct. The sale deed Exhibit II was executed on the 2nd April at Negapatam and presented for registration at Tirupundi, ten miles off, next day by Madarsa Rowthar, the senior vendor, and execution was admitted by the other vendors on the 5th April.

Now the defendant's story is that he had been in treaty for the purchase of these lands as far back as October 1902 before the date of the plaintiffs' decree. I am, however unable to accept his evidence on this point. It seems to me highly improbable that the defendant, who was an employee of the South Indian Railway on a small salary, and had been investing his modest savings for over twenty years in small purchases of land in the Conjeeveram Taluq of the Chingleput District, should, of his own accord, have embarked upon purchases of lands in the Tanjore District so far beyond his means as the event has proved. Between 1883 and 1902 Exhibits VII series show that he had made purchases for Rs. 2,644 in all, the largest single purchase being for Rs. 1,500 in 1899, whereas in this transaction he becomes, as will be seen, a purchaser for Rs. 17,500. However this may be, the evidence that he was negotiating for the purchase of these lands in October 1902 seems to me untrustworthy. His story is that the sale went off because of a difference as to price; and as corroboration he produces two stamped papers of eight annas each which he says he purchased before a price had been settled. This seems to be most improbable. Old stamped papers are easily procurable, and in the present cases they were purchased from a stamp vendor who is also the writer of the sale deed Exhibit II. The story of the 2nd defence witness that he fixed Rs. 16,000 as the price without troubling to ascertain what was due on the mortgage also seems to me most improbable. As pointed out by the Advocate-General, he is an intimate friend of Annamalai Chetty who is the person most interested in the whole

transaction, as will be seen, and he has to make admissions which affect his credit as a witness. Further it must be remembered that in cases of this kind local sympathies are apt to be with the debtors and their transferee and against persons in the position of the plaintiffs.

In my opinion we must put aside this evidence and begin with the order of the High Court, dated the 21st January 1903, transferring the plaintiffs' decree for execution to Negapatam. We next come to two transactions in which Annamalai Chetty figures. He was a money-lender at Negapatam, had a mortgage on other lands of the judgment-debtors, and was clearly doing his best to help them to defeat the plaintiffs' execution. Exhibit XIV is a promissory note bearing date the 21st February 1903 executed by Annamalai Chetty in the defendant's favour for Rs. 4,000, which eventually supplied all the purchase money found by the defendant, the remaining Rs. 11,000 being advanced by Annamalai. Nothing was directly elicited to cast doubt on the date or consideration for the promissory note, but it bears a very curious endorsement of discharge on the 20th March 1903 which, I agree with the Subordinate Judge, was fabricated for the purposes of the present case. Then on the 10th March we find Annamalai Chetty taking a transfer of the mortgage decree against the judgment-debtors and their family in respect of the suit lands for Rs. 7,232-1-0. It was admittedly at the request of the judgment-debtors that Annamalai took this transfer at a time when the plaintiffs' decree was in course of transmission from the High Court to the Negapatam Court; and it is also, I think, clear that he took it with a view to assist the judgment-debtors to defeat the plaintiffs. Not only did he advance to the present defendant the bulk of the purchase money for the sale now in question, but on the same day he himself purchased other lands of the judgment-debtors for Rs. 4,000 which was to be paid to a member of the judgment-debtors' family for a debt alleged to be due by them to her but by no means clearly proved.

Next we have Exhibit III, dated the 20th March, which purports to be a receipt given by Sheik Davood, one of the judgment-debtors, and Pakkiri Mahomed a member of the family, for Rs. 4,000, received from the defendant at the time of

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the alleged agreement for sale of the lands now in question, and the corresponding endorsement by the defendant of the discharge of Annamalai's pro-note, Exhibit XIV, for Rs. 4,000 by payment of that amount to "Pakkiri Mahomed and others of Manjakollai" the judgment-debtors' family, which is witnessed by Pakkiri Mahomed and Sheik Davood. I agree with the Subordinate Judge that these documents are unreliable. The fact that they are signed by Pakkiri Mahomed and Sheik Davood and not by Madarsa Rowthar, who was the head of the family, and effected the sale and got the sale deed registered certainly points to their having been got up for the purposes of the present case after his death in December 1903. If there had been such an agreement and payment on the 20th March, it would have been mentioned in the sale deed Exhibit II. Further it is most unlikely that Annamalai Chetty would have paid over Rs. 4,000 to the judgment-debtors and allowed them to take it away before his own claims as transferee of the mortgage-decree were satisfied. The conclusion I have come to is that the recital in Exhibit II that Rs, 4,000 had been paid previously was put in hurriedly to negative the inference that the sale was being effected to defeat and delay the plaintiffs and that Exhibit III and the endorsement to Exhibit XIV were fabricated subsequently to support this.

We next come to the execution of the sale deed Exhibit II to the defendant on the 2nd April after the judgment-debtors' houses had been attached at the instance of the plaintiffs and while proceedings for the attachment of the lands in question were pending. It is one of the extraordinary circumstances of the case that we find the defendant who was not in a position to pay for the suit lands, purchasing other lands as well on the 4th April (Exhibit VI) from a third party for Rs. 2,500, also with money found by Annamalai. The total purchase money, Rs. 17,500 is said by the defendant to have been made up of the Rs. 4,000 due to him on Annamalai's promissory note, Exhibit XIV, and of Rs. 14,000 advanced to him by Annamalai on the 4th April by a mortgage (Exhibit XV) bearing interest at 12 per cent. of all these lands and also of the lands previously purchased by the defendant. The defendant says he expected to make 6 per cent. on his purchase money, so that the transaction on the face of it

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was a ruinous one. Nearly three years later, in December 1906, at the time of the trial, the defendant had not paid Annamalai anything on the mortgage for principal or interest which had mounted up to Rs. 19,000, and Annamalai had not entered up satisfaction of his decree in consideration of the Rs. 7,500 paid to him under Exhibit II, so that he was still at liberty to execute his decree against the suit lands. In this state of things, although the plaintiffs have failed to prove that the sale deed Exhibit II was fictitious in the sense that it was intended not to be operative, one cannot help wondering whether the real transaction is before the Court and, in any case, Annamalai appears to be the person mainly interested in the result of this litigation.

The question before the Court is, was the sale under Exhibit II on the 2nd April intended to defeat and delay creditors' and if so, is it voidable against the defendant? Now if, as found by the Subordinate Judge, the intention of the vendors was to put their property beyond the reach of the creditors by converting it from land into cash, that would, I think, bring the case within S. 53 of the Transfer of Property Act. In this country, at any rate, that is the most obvious and effective method of defeating and delaying creditors. We have of course, been referred to *Wood* v. *Dixie*,[1] which, as observed in Smith's Leading Cases, Vol. 1, page 18 (11th Edition) has been followed as good law in *Hale* v. *Saloon Omnibus Company*[2] and *Darvill* v. *Terry*[3]. The first two cases were cited in *Ishan Chunder Das Sarkar* v. *Bishu Sirdar*[4], but none the less the learned Judges observed, and I agree with them, that "it would be almost a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immovable property into money which can easily be concealed, and thus to defeat or delay his creditors, should nevertheless be treated as a transferee in good faith, and the transfer to him should be upheld, though S. 53 says that a transfer made with such intention is voidable at the option of creditors." The same view has been taken in *Hakim Lal* v. *Mooshahar Sahu*[5], in the exhaustive judgment of *Mookerjee* and *Holmwood* J J. in which it is shown

1. (1845) 7 Q. B. 892.
2. (1859) 4 Drew 492; 62 E.R. 189.
3. (1861) 6 H. and N. 807.
4. (1897) I.L.R. 24 C. 825.
5. (1907) I.L.R. 34 C. 999.

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to be supported by the great authority of Lord *Mansfield* and by decisions of the Irish and American Courts.

The question therefore is, was the sale under Exhibit II effected for the purpose of defeating and delaying creditors by enabling the judgment-debtors to convert their land into cash? Now if the sale was, what it purports to be on the face of the document, a sale for Rs. 15,000, of which Rs. 7,500 was paid to Annamalai in discharge of his mortgage-decree and the balance Rs. 7,500 to the vendors, then I think the embarrassed circumstances of the vendors, the fact that the sale was hurried on after their houses had been attached and when the attachment of their lands was imminent, the hurried registration, the sale of other lands the same day to Annamalai for a suspicious consideration, all these things go to show that it was effected for the purpose of defeating and delaying creditors, and that is the finding of the lower Court. It is said, however, that the sale was effected with the intention of paying the balance to two secured creditors of the vendors, Rs. 3,500 to Annamalai himself on account of a mortgage Exhibit XVI for Rs. 5,000 effected in 1893, and Rs. 3,000 to another mortgagee, one Ramachendra Naidu, under a mortgage Exhibit IX for Rs. 18,000 effected in 1893. Now if the sale was effected with the object of preferring these two creditors to the plaintiffs and the other creditors, it is clear and is admitted that the sale would not be voidable under S. 53 of the Transfer of Property Act, but the burden of proving this, where the sale appears otherwise to be voidable, is on the defendant (*Narayana Pattar* v. *Viraraghavan Pattar*[1]) and should be established by satisfactory evidence. The finding of the lower Court is that the judgment-debtors apprehending that they could not conceal the intention with which they had sold the property to the defendant and escape from liability for arrest without accounting for the Rs. 7,500 in question subsequently gave Rs. 3,000 to Ramachendra Naick and Rs. 3,500 to Annamalai Chetty. Unless we can say that this finding is wrong, the defence fails. Now the evidence put forward by the defence as to the dates and circumstances in which these two payments were made is of a most unsatisfactory character and fails, in my opinion, to show that there was any idea of

1. (1900) I.L.R. 23 M. 184.

making these payments when Exhibit II was executed. Exhibit II mentions that Rs. 7,500 was to go in satisfaction of Annamalai's mortgage but says nothing of the balance being paid, Rs. 3,500 to Annamalai, and Rs. 3,000 to Ramachendra Naidu, and the evidence as to why they were not mentioned is most unsatisfactory. The defendant says it was intended to enter them. Annamalai says the writer of the deed was told to enter the payment to him but did not do so. Sheik Davood, one of the judgment-debtors, says the payments were not entered because it had not yet been settled how much was to be paid to each creditor. It is also curious if Exhibit II and the endorsement on Exhibit XVI formed part of the same transaction, different writers of the deed and the endorsement should have been employed. The Advocate-General went further and contended that this was a fictitious debt, that the mortgage debt due under Exhibit XVI, a mortgage for Rs. 5,000 dated the 20th May 1893 to Annamalai, had pieviously been discharged or released, but in my opinion he failed to prove this, although it is, no doubt, strange that Rs. 1,995 should have been paid for principal and interest in October 1895 as shown by an endorsement of that date. but that there should have been no further payment until the 2nd April 1903, the date of Exhibit II. But, for the reasons already given, I am not satisfied that the endorsement in Exhibit XVI or the payment therein mentioned were really made on the 2nd April, the date of Exhibit II. I am equally unable to believe that the payment of Rs. 3,000 to Ramachendra was contemplated at the time. And I am not prepared to go so far as the Subordinate Judge in accepting the endorsement on Exhibit IX, the mortgage to Ramachendra, as stating that Rs. 3,000 was actually paid him on the 5th April. The terms of the endorsement are suspicious and it is not made by Madarsa, the head of the family, but Pakkiri and Sheik Davood, which suggests it was got up after Madarsa's death in December 1903. Madarsa was managing the business and had gone 10 miles on the 3rd April to register Exhibit II. Again nothing could be more unsatisfactory than the evidence as to how this payment came to be made. Ramachendra, Defence Witness No. 8, says the money was brought him by Periasamy, his agent, but he cannot say when. He used to keep documents such as his mortgage Exhibit IX. He cannot

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say when he gave it to Periasamy. Periasamy gives no explanation as to how he came to receive payment or to have Exhibit IX ready with him for endorsement. He says payment was made to him at Annamalai's house. The judgment on the earlier claim petition, where neither Periasamy nor Ramachandra was called, shows that quite a different story was then set up and probably dropped because it could have been shown to be a concoction. Exhibit X, Ramachendra's accounts, do not seem to me to prove anything. Exhibit X b is from the 1st April 1903 to the 31st March 1904 and is kept for purposes of income tax. The writer is not called and there is no evidence when the earliest entries were made and they may well have been made at a much later date than the 5th April. Taking the transaction in Exhibit II to be what it purports to be on the face of the document, so far as the recipients of the consideration are concerned, the evidence that it was anything else seems to me unsatisfactory and unreliable. I am unable to differ from the conclusion arrived at by the Subordinate Judge that it was intended by the judgment-debtors to defeat and delay their creditors.

The next question is, is the sale voidable against the defendant as transferee ? In these cases it has been held by *Jenkins* C. J. and *Aston* J. in *Amarchand* v. *Gokul*[1], that it lies on the transferee to prove good faith on his part and consideration : "If, however, it be proved that there was a valuable consideration adequate to the occasion, the Court will be slow in ordinary circumstances to hold that there was no good faith." Bearing this last consideration in mind, I am still unable to hold that there was good faith in Annamalai who advanced part at least of the purchase-money and acquired a preponderating interest under the mortgage, Exh. XV, in the lands conveyed by Exh. II. As regards the defendant also, I am unable, on the best consideration I can give to the case, to hold that he has shown himself to be a transferee in good faith. For reasons already given I cannot regard him as a purchaser in the ordinary course of business, and I am even constrained to question whether the real nature of the transaction as between him and Annamalai is before the Court. If not, this is a strong indicium of fraud. The hasty manner in which the price was fixed without any valuation

1. (1903) 5 Bom. L.R. 142.

of the arrears, ploughing cattle and other things he was taking over in addition to the land, and the hurried registration also indicate that he knew all the facts, and prevent me from differing from the Subordinate Judge on this point.

The Subordinate Judge has held that the properties conveyed by Exh. II were the exclusive property of Madarsa, but he gives no reasons for his finding. The contentions of the parties are set out in paragraphs 93 to 95 of the judgment, and the conclusion I have come to is that both the suit properties belonged to the family and not to Madarsa Rowther alone as did the business in which they were engaged. The decree which the plaintiffs were seeking to execute was only against Mahomed Rowther and Sheik Davood, but the present plaint states that the business was being carried on by them on behalf of the family, and the family were heavily indebted to the plaintiffs as well under other bonds in respect of which debts decrees have been obtained, and this is borne out by Sheik Davood's evidence, as defence witness No. 5. In these circumstances, I have come to the conclusion that Exh. II was executed by the other parties also for the purpose of defeating and delaying their creditors, including the plaintiffs, though not, of course, in respect of the pending execution on which they were not liable.

The next question is as to whether the defendant is entitled to a charge upon the property for the amount of Rs. 7,500 which he paid in discharge of Annamalai's mortgage decree. In *Chidambaram Chettiar* v. *Sami Aiyar*, [1] it was held that a transfer of a decree intended to defeat and delay creditors was wholly void and that the transferee was not entitled to execute it jointly with the transferor on the ground that the consideration for the transfer was the discharge by the transferee of some debts actually due by the transferor. In that case the transferee had merely paid off certain debts due by the transferor. Here he has discharged a valid mortgage previously binding on the property and I do not think it would be equitable to give the plaintiffs the relief they ask for except upon the terms of giving the defendant a charge for the Rs. 7,500 which he has expended in discharging the mortgage decree against the suit property,

1. (1906) I.L.R. 30 M. 6.

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but this again must be conditional on the payment of Rs. 7,500 being certified by Annamalai if he has not already done so within one month of the receipt of this decree by the Subordinate Court. The decree of the lower Court must also admittedly be modified with regard to the defendant's purchase under Exh. VI which has, by mistake, been included in the decree. The parties will pay and receive proportionate costs throughout.

Miller J.—I agree that, if it be found that the vendee assisted the vendors to convert their land into cash to enable them to keep it out of the hands of their creditors, the sale will be voidable under S. 53 of the Transfer of Property Act, and I agree also that in the present case the vendee ought to be allowed a charge on the land sold to the amount of Rs. 7,500, and as to the terms on which the charge should be allowed.

I have had greater difficulty in accepting the evidence as sufficient to establish a case under S. 53 of the Transfer of Property Act, but I am not prepared to dissent from my learned brother's conclusion. I therefore agree in the modification of the decree proposed by him.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Choragudi Venkatadri .. Appellant in Cr. A. No. 487 of 1909. (*1st Prisoner*)*

Oruganti Venkata Subbarao .. Appellants in C. A. No. 522 of 1909. (*2nd Prisoner*)

Boddupalli Subbayya *and* Timmana Kondalrayudu Naidu } Appellants in Cr. A. No. 563 of 1909. (*4th and 6th Prisoners.*)

v.

Emperor .. ..

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Cr. P. C., S. 235—"Same transaction", meaning of—Insurance Company in fraud of the public—Dharkast-holders or applicants.—Not subscribers—"Company varu" construction—Conduct of accused.—Effect of, in the construction of Articles of Association.

Per *Abdur Rahim* J.—In order that a series of acts or several acts may constitute one and the same transaction within the meaning of S. 235, Cr. P. C., there should be not only community of purpose but also continuity of action. The mere existence of some general purpose or design is not sufficient to make all acts done with that object in view, part of the same transaction. The purpose in view must not be too general and vague but must be something particular and definite such as where a man with the object of misappropriating a sum of money or of cheating a particular individual of

*Cr. A, Nos. 487., 522 and 563 of 1902, 2nd February 1910.

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a certain amount falsifies books of account or forges a number of documents. A series of acts of misappropriation or cheating in pursuance of a general policy of misappropriation or cheating the public will not form one and the same transaction, each act therein being complete in itself.

Per *Benson* J. :—Whether any series of acts is so connected or not as to form one and the same transaction must necessarily depend on the exact facts of each case, but they are so varied in character that it is impossible to provide a completely accurate definition, though there is usually no great difficulty in deciding whether any particular case comes within the rule.

An insurance fund was started by the accused with the object of enabling middle class people to secure "high profits" in return for the money subscribed by them. The maximum amount to be paid by each "diploma-holder" applicant at the rate of Re. 1, a month was Rs. 53; and at the end of each year half the amount of money collected during the year was to be distributed among the "nominees" of the "applicants" who happened to die in the year, subject to a maximum of Rs. 1,000. The first three Rupees to be paid by each subscriber was to be treated as entrance fee and that together with 3 annas in every rupee of the subscription was to go to the "Company people." The Company in the very nature of things could go on only so long as there were a large number of new applicants and a very limited number of deaths The accused directors submitted to the Registrar the names of the applicants and issued notices to them in accordance with the rules of the Companies Act. The directors (six in number) were charged *inter alia* with having misappropriated 3 distinct sums during a period extending over nearly two years and some of them with cheating and falsification and tried together.

Held :—(1) That there was a misjoinder of charges and the trial was bad.

(2) That in the circumstances of the case the words "Company people" in the rules meant only the directors and not the diploma-holders and that the conduct of the accused in treating the diploma-holders as share-holders by giving notices to them could not override the Articles of Association.

(3) That though the whole scheme was in fraud of the unwary and credulous public, no offence was committed in the appropriation by the directors of money set apart according to the rules to the "company people."

Appeals from the sentences of the Court of Session of the Guntur Division in Case No. 13 of the Calendar for 1909.

P. R. Sundara Aiyar and *A. Krishnaswami Aiyar* for appellant in Cr. Appeal 487 of 1909.

L. A. Govindaraghava Aiyar for appellant in Cr. Appeal 522 of 1909.

S. Swaminathan for *E. Osborne* and *M. K. Narayanaswami Aiyar* for appellants in Cr. Appeal 563 of 1909.

Public Prosecutor (*C. F. Napier*) in support of the conviction.

The Court delivered the following

JUDGMENTS.—*Benson* J :—I agree with the conclusions arrived at by my learned brother whose Judgment I have had the advantage of perusing. There can be no doubt, I think, that the so called Provident Fund, with its hypocritical professions of philanthropy and large promises of profit to all, was, from its very inception, a gambling concern, cunningly devised

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to swindle the unwary and ignorant. Its ariticles of association were such that effect could be given to them only for a brief period while the number of subscribers was rapidly increasing and the number of deaths among the lives insured was few. While this condition of things lasted the few subscribers whose nominees died stood to receive handsome sums compared with the subscriptions paid, but as soon as the increase in the number of new subscribers slackened or deaths increased, it was bound inevitably to become impossible to continue to pay the benefits promised in the prospectus, and liquidation became a necessity. The articles of association are, however, so elaborate and involved that all this would not be apparent to any one reading them unless he was both an attentive and intelligent person, and, no doubt, the promoters of the Company, including the accused counted on this, as well as on the cupidity and gambling spirit of those to whom they appealed, to secure subscribers to the Fund. Among the charges brought against the accused, there were three of having cheated specific persons, but the accused have been acquitted on these charges and there is no appeal against the acquittal, so it is not necessary to consider whether the conduct of the accused amounted to that offence.

As regards the offences of misappropriation of which they have been convicted I think it is clear that they must be acquitted. It has certainly not been shown that the "Company people" referred to in Articles 10 and 14 mean the subscribers. In fact there is no doubt that those words must be held to mean the Directors, that is the accused themselves, and their heirs; and that both the entrance fees of Rs. 3 for each subscriber and the sum of 3 annas in each rupee subsequently paid as subscriptions were set apart under the articles for certain expenses including the profits of the Directors. The accused were, therefore, not guilty of any offence in appropriating these sums for themselves, and there is no charge of misappropriation against them except in regard to these sums. I also agree with my learned brother that the trial was illegal as contravening the provisions of the Criminal Procedure Code with respect to the joinder of more than one charge at one trial. The joinder of the various charges could only be supported, if at all, provided they were "committed in one series of acts so connected together as to form the same

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transaction" within the meaning of S. 235 of the Code. I do not think that it is necessary or advisable to attempt to define the expression "the same transaction" which the legislature has left undefined. Whether any series of acts is so connected or not must necessarily depend on the exact facts of each case, but these are so varied in character that it is impossible to provide a completely accurate definition. There is, however, usually no great difficulty in deciding whether any particular case comes within the rule. In the present case I do not think that it can be said that the alleged misappropriations, extending over the whole period of the Company's existence, were committed in the course of the same transaction within the meaning of S. 235; for, if so, the expression would equally cover misappropriations of a similar kind extending, it may be, over 40 or 50 years. This would obviously render nugatory the provisions of the law which are designed to simplify and define within reasonable limits the charges that may be tried at one and the same time and so avoid the embarrassment of the accused and I may add of the jury, in attempting to deal with a multitude of charges at one and the same time. How necessary is a rule of the kind is well exemplified by the Sessions Judge's judgment in the present case. It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code, instead of straining them to cover doubtful cases.

If we were of opinion that on the merits there was a case against the accused we should have had to order a retrial owing to the illegality of the trial of the various charges at one trial, but this is unnecessary in the view we take of the facts.

The accused must be acquitted and the fines, if levied, must be refunded.

In my opinion the Legislature might well consider whether some action is not called for with a view to protect the ignorant and unwary from the snares set for them by such Companies as that of which the accused are Directors.

Abdur Rahim J :—In Sessions Case No. 13 of 1909 six persons were placed on their trial before the Sessions Judge, Guntur Division, and assessors. All the six accused were charged as Directors of the Circars Provident Fund, Bapatla,

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with having committed breaches of trust in respect of three sums of money alleged to belong to the Company, *viz.*, Rs. 469-13-3 between the 30th September 1905 and the 25th March 1906, Rs. 4,639-8-6 between the 25th March 1906 and the 25th March 1907 and Rs. 5,226-7-1 between the 25th March 1907 and the 18th September 1907, the misappropriation thus covering a period of nearly 2 years. The 4th and 6th accused were also charged with having falsified certain accounts by making false entries therein on the 20th and the 25th April 1905, and these two and the 1st accused with having falsified another document on the 24th June 1905. The 6th accused was further charged with having cheated two persons, one on the 6th March 1905 and another on the 29th March 1905, and the 4th accused with having cheated a third person on the 17th June 1905. Those among the six accused persons who were not charged with the substantive offence of falsification of accounts and cheating were charged with having abetted the commission of those offences. *Prima facie* the trial is open to objection on the ground of multifariousness. It violates the express injunctions of the legislature prohibiting the trial of several offences covering a period of more than one year at one trial and the trial together of a number of offences which are not of the same kind within the meaning of the Code. Objection on this score was taken on behalf of the defence before the Sessions Judge, but the Public Prosecutor contended that the trial was justified by the provisions of S. 235, Criminal Procedure Code, and the Sessions Judge accepted the contention. The same section of the Code is relied on before us by Mr. Napier to uphold the legality of the trial and if the trial can be justified at all it must be by virtue of S. 235, Criminal Procedure Code. It may be mentioned that the charges relating to falsification of accounts and cheating failed and all the accused have been acquitted of those charges. But if the joinder of those charges was in violation of the law the accused must have been considerably embarrassed in their defence on the remaining charges and their acquittal on the charges which the prosecution failed to prove cannot make valid the trial if it was illegal *ab initio*. Further the charges of criminal breach of trust as laid, and of which the appellants have been convicted, are themselves in violation of the law, as

the alleged acts of misappropriation extended over a period of more than twelve months.

S. 235, Criminal Procedure Code, allows of a number of offences, even if exceeding three and extending over a period of more than twelve months, being tried at one trial if they are committed "in one series of acts so connected together as to form the same transaction." It is argued that the case of the prosecution being that the Provident Company was in fact a bogus concern and the object with which it was set on foot by its promoters, these being the six accused, was to defraud the public, the various offences charged against them came within the purview of S. 235, Criminal Procedure Code.

I think this contention of the prosecution is clearly unsus tainable. Now what is the nature of the connection contemplated between different acts which would bind them into the 'same transaction'? The idea conveyed by the words "same transaction" seems to be obvious enough and it may be doubted whether it can be compendiously expressed in simpler and clearer language. And, generally speaking, there can be very little difficulty in arriving at a proper conclusion in a concrete case. For instance in this case what is said to connect the different acts charged into one transaction is the allegation that these acts were committed by the six persons in pursuance of a systematic scheme for defrauding those members of the public who might subscribe to the Fund. If this contention were sound then if the Company was carried on for ten or twenty years and a hundred acts of embezzlement were committed during that period the accused would be liable to be tried at one trial for all those offences. Obviously this cannot be the scope of S. 235, Criminal Procedure Code. No doubt proximity of time any more than unity of place is neither a necessary nor decisive test of what constitutes the "same transaction" though such proximity often furnishes good evidence of the connection which unites several acts into one transaction; see *Krishnaswami Pillai* v. *Emperor*[1]. I think, and this seems to be the effect of the decisions reported in *Emperor* v. *Sheruf Alli*,[2] *Emperor* v. *Datta Hanmant Shahapurkar*,[3] *Queen Empress* v. *Fakirapa*,[4]

1. (1903) I.L.R. 26 M. 125.
2. (1903) I.L.R. 27 B. 135.
3. (1906) I.L.R. 30 B. 49.
4. (1891) I.L.R. 15 B. 491.

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and *Queen-Empress* v. *Vajiram*, [1], that at least in a certain class of cases—the present case is alleged to be within that category—community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps, as suggested, by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to those acts. But mere community of purpose is not sufficient; there must also be continuity of action. For it may happen that an act is done with a particular object in view but the final aim is abandoned for some time and pursued afterwards. For instance, suppose a man forges a document with a view to cheat a certain individual and then foregoes his intention for two years and afterwards reverts to his original intention and uses the document for the fraudulent purpose which he had in mind when he committed the forgery, it would be difficult to say in such a case that the offences of forgery and of cheating by means of the forged document were committed in course of the same transaction. As regards community of purpose I think it would be going too far to lay down that the mere existence of some general purpose or design such as making money at the expense of the public is sufficient to make all acts done with that object in view part of the same transaction. If that were so, the results would be startling; for instance, supposing it is alleged that *A* for the sake of gain has for the last ten years been committing a particular form of depredation on the public, *viz.*, house-breaking and theft, in accordance with one consistent systematic plan, it is hardly conceivable that he could be tried at one trial for all the burglaries which he committed within the ten years. The purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of a certain amount falsifies books of account or forges a number of documents. In the present case not only is the common purpose alleged too general and vague but

1. (1892) I.L.R. 16 B. 414.

there cannot be said to be any continuity of action between one act of misappropriation and another. Each act of misappropriation was a completed act in itself and the original design to make money was accomplished, so far as the particular sum of money was concerned, when the misappropriation took place. This also holds good with reference to the several charges of cheating though the falsification of accounts may have connection with the charges of misappropriation.

In my opinion, therefore, the trial was illegal.

I am also of opinion that the convictions of the accused are not justified by the evidence in the case and there should not be any retrial. The proposed objects of the Company were to enable people of the middle class to secure "high profits" in return for the money subscribed by them and the advancement of charitable works. Its *modus operandi* may be shortly described as follows. The fund of the Company was to consist of subscriptions paid by persons who are called "pattadars" and also described as "subscribers" or "nominees" or "diploma-holders." The subscriptions payable were to be at the rate of Re. 1 a month and no subscription was to be paid after 53 payments or after the death of the person called "Darkhastdar" or "applicant." At the end of each year, half the amount of the money collected during the year was to be distributed among the "nominees" of those "applicants" who happened to die during that year in proportion to the amount of money paid under each patta subject to the maximum of Rs. 1,000. By rule 14 of the articles of association 8 annas out of every rupee subscribed was to go towards the bonus fund, while the remaining 8 annas was to be dealt with as follows :—

0 2 0 Reserve fund.

0 0 6 Gurantee fund up to Rs. 5,000.

0 0 6 Charity fund.

0 2 0 Commission to agents; the rest *i.e.*, 3 annas out of each rupee "will go towards the expenses of the company, *viz.*, office establishment charges, printing charges, etc., and towards the profits of the *company people* (the vernacular words being "*company varu*"). Another rule (No. 10) provided that the first three rupees paid by a subscriber would be treated as entrance fee and not as subscription and "this entrance fee will

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be appropriated by the *company people* for expenses, etc., and shall not form part of the bonus which will be distributed." The object of the guarantee fund was to secure to the nominees at least twice the amount paid by the subscribers. Thus the benefit which is promised in express words to the nominees or subscribers is the bonus which in no case is to fall short of twice the amount paid as subscriptions but which may extend up to Rs. 1,000. The "applicant" or "darkhastdar", on whose death alone his pattadar or nominee is to get the bonus that may fall to his lot, need not be under any particular age limit, nor is any certificate required as to the state of his health, nor need he be in any way related to the nominee so as to give the latter an insurable interest in his life. A lucky pattadar therefore stands to win a price of Rs. 1,000 for paying in a few rupees, may be 12 or may be 53, but not exceeding fifty three rupees and in any case a pattadar whose darkhastdar happens to die before the company is wound up is sure to get twice the amount subscribed. There is no proper provision for the profitable investment of the funds of the company and the company may go into liquidation whenever it chooses. Such a concern can only last so long as there is an accession of new diploma-holders every year and a fair proportion of the "applicants" do not happen to die in the course of the year. As a business undertaking it has no sound or stable financial basis and the so-called Provident Fund appears to be more in the nature of a lottery than anything else. It may be assumed that the promoters of the company must have foreseen this and it could not be expected that they should have promoted a concern of this nature without at least securing for themselves an adequate return for their trouble. The case therefore of the accused is that by the *Company varu* in Rules 10 and 14 they meant themselves and not the diploma-holders. This has been their contention from the time the Fund was started and the entrance fee as well as the 3 annas out of each rupee have been treated in the books of account as money over which they had absolute control to be disposed of in meeting the expenses and providing their own profits. At the meetings of the diploma-holders the balance sheets were circulated among them and these showed that the very sums which the accused are alleged to have misappropriated were treated by them as their own money and no objection

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was taken to this by any one. Those diploma-holders to whom bonus became due were regularly paid ; the reserve fund, the guarantee fund, and the charity fund have not been touched, and no irregularity of any importance has been pointed out in the conduct of the business such as it was. All the books were regularly and correctly kept. Under these circumstances it would be very difficult to say, even if the action of the accused were not justified by the rules, as we think they ought to be interpreted, that they, in dealing with the amounts as their own, did not believe in good faith that they had a right to do so. But I may say without entering into a detailed consideration of the question that I am not satisfied that by the "Company people" in Rules 10 and 14 is meant the diploma-holders or darkhastdars or both. On the other hand having regard to the fact that express provision is made for bonus to diploma-holders and no rules whatever are made for declaration of dividends, which I should have expected to find if the diploma-holders were regarded as share-holders of an ordinary Joint Stock Company, I am inclined to the view that by the phrase "Company varu" the promoters of the Fund alone were meant.

No doubt the accused from time to time submitted to the Registrar the names of the applicants or the diploma-holders and issued notices to those persons in accordance with the rules of the Companies Act which would not have been necessary in law unless they thought the diploma-holders were really the share-holders. I do not, however, think that the inference which might thus be suggested by this conduct of the accused is sufficient to override the provisions of the articles of association, especially when we find that the sums now alleged to have been dishonestly misappropriated were appropriated by the accused with the knowledge of the diploma-holders and with their approval in assertion of a right inconsistent with the claim which is now put forward by the Public Prosecutor on behalf of the diploma-holders. I would set aside the convictions and sentences and acquit the accused. The bail bonds of such of the accused persons as are on bail will be discharged. The fines if levied will be refunded to the accused.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Natesa Aiyar and others .. Appellant* (*Defendant*)

v.

Appavu Padayachi .. Respondent (*Plaintiff.*).

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Contract Act, Ss. 64, 73, 74—*Vendors and Purchasers—Deposit—Breach of contract. Forfeiture—Time, if essence of contract—Penalty, meaning of—Deposit whether "benefit derived under the contract."*

Per *Wallis* J. (*Sankaran Nair* J. *contra*).—A deposit, though in money, for the performance of a contract must be regarded as outside of and collateral to, the main contract; and S. 64 of the Indian Contract Act does not cover the case of a deposit of earnest money.

Semble: Even if S. 64 covers the case of a deposit, it is open to the parties on the principle *quilibet potest renunciare juri pro se introducto* to provide for the forfeiture of the deposit on default of performance.

Ss. 73 and 74 of the Indian Contract Act deal with the right to recover compensation for breach of contract, and do not deal with the right of the defaulting party to recover back the deposit he has paid or with the right of the other party to retain it.

A deposit agreed to be forfeited is not agreed on as liquidated damages but goes in reduction of damages; and the distinction drawn by courts of equity between stipulation for liquidated damages and stipulation for penalties has not any bearing on a deposit of earnest money.

Per *Sankaran Nair* J.:—A deposit by a purchaser under a contract of sale of land, is not forfeited by him where there is no repudiation or abandonment of the contract by him; and where the vendor rescinds it before the contract is put an end to by the purchaser, he cannot retain the deposit but is only entitled to be compensated; *i.e.*, where the damage sustained can be assessed and it is below the deposit amount it will not be forfeited, and where no damage is sustained, the deposit should be restored to the purchaser.

Time is not of the essence of the contract and a purchaser is entitled to perform his part of the contract within a reasonable time after the expiry of the due date.

Ss. 73 and 74 of the Indian Contract Act are intended to get rid of the distinctions between penalties and liquidated damages and S. 74 shows that a deposit, as such only, is not forfeited by any breach of contract. The word "penalty" in S. 74 means any provision intended to compel the performance of a contract and includes a deposit.

A deposit is a benefit derived under the contract within the meaning of S. 64.

S. 64 is applicable to cases of deposits also and its scope is not restricted to contracts voidable under Ss. 19 and 19 A.

A provision for forfeiture of a deposit in default of a person finding purchasers for the whole plot of land or even any small portion of it within a specified day is a penalty and can be relieved against. The rule of law that the distinction between penalty and liquidated damages does not apply to a pecuniary deposit is not applicable where the damages may be accurately estimated.

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* A. No. 131 of 1907. 21st September 1909.

A agreed with *B* to purchase (or rather to secure purchasers for) certain lands from *B* for Rs. 41,000, out of which a sum of Rs. 4,000 was paid as "advance." ; Rs. 17,000 was to be paid before 24th May ; for the balance a mortgage was to be executed. The plaintiff was to forfeit the advance if he failed to pay before the 24th May and obtain the sale-deed. If there was a default on *B*'s part to execute the sale-deed before that date he was to return the deposit with an additional sum of Rs. 4,000.

A failed to secure purchasers for the entire lands before the specified day. *B* sold the lands afterwards for more than Rs. 41,000. The contract contained a stipulation to the effect that *B* was to execute the conveyance either in favor of the purchaser or of those appointed by him.

Held :—Per *Wallis* J. :—That the last stipulation cannot mean that the purchaser had a right to make the vendor part with his lands in parcels to third parties for an apportioned amount of the purchase-money : its only effect being to oblige the vendor on payment of the purchase-money to execute separate conveyances of different parcels of the lands if the vendor so desired.

Held also :—That the deposit is forfeited on breach of the contract by *A*.

Per *Sankaran Nair* J. :—That *A* never abandoned the contract or repudiated it and that *A* was entitled to perform it within a reasonable time after 24th May and the contract having been repudiated by *B* on 25th May, *A* was entitled to recover the deposit.

Appeal from the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 9 of 1906.

Suit for the recovery of Rs. 8,200 with interest and for the execution of a sale-deed by the 1st defendant to plaintiff for Rs. 41,000 in respect of one item of property under a contract for sale of lands between plaintiff and 1st defendant on 24th February 1903. The plaintiff's case was that under the contract 1st defendant should sell his lands for Rs. 41,000 in favour of purchasers to be procured by plaintiff, that if the lands should fetch a higher price than Rs. 41,000, the excess should go to the plaintiff; that though a time of 3 months was fixed for the performance of the contract, time was not of the essence of the contract ; that purchasers were got by him, to the extent of Rs. 45,200, and that he was entitled therefore to Rs. 4,200, *i.e.*, the difference between Rs. 4,000 which had been advanced by him as deposit on account of purchase money and the amount of a sale-deed in respect of the remaining lands. The 1st defendant, while admitting the contract, contended that time was of the essence of the contract; that plaintiff having procured only one purchaser for Rs. 12,500 and having failed to procure any other purchaser within the time fixed, in spite of a notice by the defendant (Ex. VIII), he rescinded the contract ; that subsequent purchasers were all of his own procuring ; that under the contract the plaintiff was to forfeit the deposit if he failed to pay up the money within the

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3 months fixed by the contract; that on all these grounds plaintiff's claim was not sustainable. On these allegations the following among other issues were framed :—

(1) Whether time was not of the essence of the contract?

(2) Whether the sales were brought about by plaintiff?

(3) Whether the plaintiff is entitled to specific performance or any other and what relief?

(4) Whether any and what amount is due to plaintiff from defendant in respect of the plaint claim?

The material passages in the agreement were the following "* * I have settled to absolutely sell you * * * for the price of Rs. 41,000 * out of which the amount received as advance on this date is Rs.4,000 and I have executed this agreement on condition that out of the balance of Rs. 37,000 left after deducting the above, you shall pay Rs. 20,000 by means of a hypothecation executed on the said land and house and within one year's time * * and bring and pay me in ready cash the balance of Rs. 17,000 * * before 24th May next and obtain the sale-deed; that if there be delay on your part in executing the sale-deed on the said due date, you shall forfeit the above said amount of advance and that if there be delay on my part in executing the sale-deed, Rs. 4,000 in addition to the amount of advance shall be paid. I shall execute the said sale-deed in your favour or in favour of those pointed by you."

The Sub-Judge held on a construction of the contract that time was of the essence of the contract; that plaintiff had failed to carry out his portion of the contract; that the defendant was under the circumstances entitled to rescind the contract, and that therefore the plaintiff was not entitled to specific performance or profits, but that under S. 64 of the Contract Act, defendant was bound to restore the benefit which he got from the plaintiff and the defendant having sustained no damage, but on the other hand having made a profit, was bound to restore Rs. 4,000 the deposit amount notwithstanding the clause as to forfeiture of deposit (which could be relieved against.) Defendant appealed.

V. Krishnaswami Aiyar and *T. S. Rajagopala Aiyar* for appellant.

T. Rangachariar and *T. R. Krishnaswami Aiyar* for respondent.

V. Krishnaswami Aiyar—contended that payment according to the terms of the contract was a condition; the failure to act accordingly put an end to the contract *ipso facto*; that both under the terms of the contract and under the general law that governed deposits, plaintiff was not entitled to recover the amount of deposit. The deposit was a sum paid as guarantee for the performance of the terms of the contract and was collateral to the contract. Non-performance of the terms of the contract disentitled the party from recovering the deposit. See per Lord Macnaughten in *Soper* v. *Arnold*[1], which was in appeal from the case reported in 35 Ch. D. at p. 384; *Howe* v. *Smith*[2]; *Cooper* v. *London and Brighton Railway Company*[3]. The right to restoration was confined to benefits got by the performance of the terms of the contract and not by payments which form the basis as it were of contract. If the contract is entered into on the basis of a certain payment, call it what you will, deposit, earnest or part payment, on the rescission of the contract, it cannot be recovered. S. 64, I.C. A, did not alter the law. S. 74, Contract Act, does not apply to a case where no damages are claimed and therefore need be assessed. He cited *Bishan Chand* v. *Raja Kishan Das*[4], *Ibrahimbhai* v. *Fletcher*[5], *Balvanta* v. *Bira*[6], to show that the Indian Law does not differ on this matter from the English. The clause as to forfeiture is not to be relieved against unless it is so unreasonable as to vitiate the whole contract—*Maniam Pattar* v. *Madras Railway Company*[7]. It does not matter that the other party has made profit out of the breach-*Lethbridge* v. *Kirkman*[8]. The distinction between initial deposit and subsequent part-payment is pointed out in *Cornwall* v. *Henson*[9]; *vide* also Sheppard and Cunningham's Commentaries on the Indian Contract, referred to S. 64; and also to the query of Maclean C.J. in *Brohmo Dutt* v. *Dharmo Das Ghose*[10] as to S. 64 being confined to cases under S. 19, I. C. A. There was no reason why a party should not contract himself out of the provisions of S. 64 of Indian Contract Act. No question of public policy is involved in it.

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1. (1889) 14 A. C. 429 at 435.
2. (1884) 27 Ch. D. 89.
3. (1871) 4 Ex. D. 888.
4. (1897) I.L.R. 19 A. 89.
5. (1896) I.L.R. 21 B. 827 (FB.)
6. (1897) I.L.R. 23 B. 56.
7. (1905) I.L.R. 29 M. 118.
8. (1855) 25 L.J. Q.B. (N.S.) 89.
9. (1900) 2 Ch. 298.
10. (1873) I.L.R. 26 C. 389.

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T. Rangachariar—contended that time was not of the essence of the contract; that the defendant had waived the right to insist upon performance in time; at any rate, there was no repudiation by the plaintiff so as to bring the case within the principle of the cases cited; though the purchaser could not claim specific performance he could still recover the purchase-money; *Levy* v. *Stogden*[1] *In re Dagenham (Thames) Dock Co: Exparte Hulse*[2]; *Gee* v. *Pearse*[3]; that forfeiture could be relieved against, *ibid* and Gour's Transfer of Property Act p. 463 and cases cited therein. He relied upon *Cornwall* v. *Henson*[4] to shew that from mere non-payment abandonment could not be inferred He also cited (1904) W.N. p. 163 which lays down that the vendor cannot both rescind the contract and retain the deposit. At any rate in India S. 64 governs the case; the definition of the word "voidable," and the use of it in S. 55 makes it clear that the present case comes within S. 64. The only right the defendant has is to damages under S. 74, the deposit to go against damages, and it is not competent to parties to contract out of S. 64 there being no words like "in the absence of a contract to the contrary" therein. He relied for this view upon *Subbarao* v. *Devu Shetti*[5], *Srinivasa* v. *Rathnasabhapathi*[6].

V. Krishnaswami Aiyar, in reply, cited Halsbury's Laws of England, Vol. 7, p. 482, and showed that in *Howe* v. *Smith*[7] repudiation was inferred from non-performance within time, time being of the essence of the contract-(Fry. L.J. at p. 105); *Soper* v. *Arnold*[8]. *In re Dagenham (Thames) Dock Company: Exparte Hulse*[2] was not a case of initial deposit and turned upon the contract being in fraud of the Company (cf. *Cornwall* v. *Henson*)[9]. *Srinivasa* v. *Rathnasabapathi*[4] cites *Soper* v. *Arnold*[8] and is not a case of a deposit being forfeited but a case coming strictly within S. 74 a case of penalty. *Cur. ad vult.*

The Court delivered the following

JUDGMENTS:—*Wallis* J.—This was a suit by the purchaser against the vendor for specific performance of a contract for the sale of immovable property and in the alternative for the return of the deposit of Rs. 4,000 paid by the purchaser. The purchaser failed to complete within the stipulated time, and the

1. (1898) 1 Ch. 478.
2. (1873) 8 Ch. A. 1022.
3. (1848) 64 E.R. 146.
4. (1900) 2 Ch. 298.
5. (1891) I. L. R. 18 M. 126.
6. (1892) I.L.R. 16 M. 474.
7. (1884) 27 Ch. D. 89.
8. (1887) 35 Ch. D. 384.

lower Court, finding that time was of the essence of the contract and that the defendant exercised his option of avoiding the contract under S. 55 of the Indian Contract Act on the plaintiff's failure to complete, refused to give the plaintiff specific performance but ordered the defendant to return the deposit of Rs. 4,000 paid by the plaintiff at the time of executing the contract of sale, Exhibit *A*, although in such contract it is expressly stipulated that the amount was to be forfeited by the plaintiff in the event of his delaying to complete the contract by the 24th May 1903, and he admittedly so delayed. This express provision is overridden, in the opinion of the lower Court, by the provisions of S. 64 of the Indian Contract Act that when a person at whose option a contract is voidable rescinds it, he must restore, so far as may be, any benefit he has received under the contract to the other party.

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The question was argued before us at considerable length. In expressing my own opinion I propose to deal in the first place with the provisions of the Indian Contract Act. Several cases as to the right to recover deposits have been decided in India since the passing of that Act, but in none of them has it been suggested that this question was affected by the provisions of S. 64 or any other section of the Act. As pointed out by the House of Lords in *Soper* v. *Arnold*[1] the deposit is primarily a security or guarantee for the performance of the contract, and, as observed by *Fry*, Lord Justice, in *Howe* v. *Smith*,[2] "creates by fear of its forfeiture a motive in the parties to perform the rest of the contract." If, however, the law will not allow the deposit to be forfeited, this motive ceases to operate and the deposit ceases to be a guarantee or security for the performance of the contract. The learned Lord Justice goes on to observe that "the practice of giving something to signify the conclusion of the contract, sometimes a sum of money, or sometimes a ring or other object, to be re-paid or re-delivered on the completion of the contract, appears to be one of great antiquity and of very general prevalence," and it would further appear from COLEBROOK'S *Digest*, Vol. 2, page 77, that India may be added to the list of countries in which it prevailed. It was certainly, therefore, not to be anticipated that S. 64 should have the effect of enforcing the return of the deposit to the defaulting party, when, owing to his default, the other party puts

1. (1889) 14 App. Cas. 429. 2. (1884) 27 Ch. D. 89 at p. 101.

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an end to the contract, the very case the deposit was intended to meet. S. 64 provides that, where a person at whose option a contract is voidable rescinds it, the rescinding party shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be to the person from whom it was received. Now a deposit regarded as a security or guarantee for the performance of a contract must be regarded as outside of and collateral to the main contract, although consisting of money. If the contract be performed it will go in part performance thereof, but it might equally be a ring or some other object which could not go in part performance and would have to be given back on completion of the contract. Where we have a contract and a guarantee for its performance, although they are included in the same instrument it does not seem to me necessary to hold that the provisions of S. 64 requiring the party avoiding the contract to restore any benefit he has received thereunder as far as may be, extend to a deposit regarded as a guarantee. Even if a section of this kind applied in terms, it would, I think, be open to the parties on the principle *quilibet protest renunciare juri pro se introducto* to provide, as they have in this case provided, that the deposit should not be returned on the avoidance of the contract ; but I prefer to base my judgment on the view that the section does not apply. The opposite construction contended for would involve a serious, not to say uncalled for, alteration in the law, and if the legislature had intended to make any such alteration, it would, I think, have made its intention clear by the use of express terms. I feel further strengthened in the view by the number of Indian cases as to deposit which have since been decided without reference to this section.

We have also been referred to Sections 73 and 74, but in my opinion, these sections deal with the right to recover compensation for breach of contract, and do not deal with the right of the defaulting party to recover back a deposit he has paid or with the right of the other party to retain it.

The distinctions drawn by Courts of Equity between stipulations for liquidated damages and stipulations for penalties have not, in my opinion, any bearing in this case. Ordinarily a deposit of this kind is not agreed on as liquidated damages but goes in reduction of damages. Of course the parties may agree that the

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deposit shall be treated as liquidated damages. In the next place Courts of Equity do not regard a stipulation for the forfeiture of a deposit as a stipulation for penalty from which Equity will relieve. In the case of *Maniam Patter* v. *The Madras Railway Company*,[1] to which my learned brother was a party, this Court accepted, and acted on this rule and dissented from the case of *Srinivasa* v. *Rathnasabapathi*[2] in which it had been lost sight of, proceeding upon the authority of *Wallis* v. *Smith*[3] in which Sir George Jessel states the rule clearly as follows, at page 258:—"There is a class of cases relating to the deposits. Where a deposit is to be forfeited for the breach of a number of stipulations some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the Judges have held that *this rule*" (*of treating the stipulation as a penalty*) "*does not apply, and that the bargain of the parties is to be carried out.*" The italics are mine. In the earliest case of *In re Dagenham* (*Thames*) *Dock Co*; *Exparte Hulse*[4] which has been cited, a stipulation that half the purchase-money should be paid in advance and forfeited for any breach of the conditions was treated as a penalty, but the amount was so large as to take it out of the ordinary class of deposits, and it does not appear to have been treated as such and that is probably why Sir George Jessel did not think it necessary to refer to it as qualifying the rule laid down by him.

In the present case the price was Rs. 41,000 of which Rs. 4,000 was paid in advance and Rs. 20,000 was to be paid by means of a mortgage and the balance of Rs. 17,000 before the 24th May next when the conveyance was to be executed, and if there was any delay on the part of the vendee the Rs. 4,000 was to be forfeited. The contract also contained a stipulation that the vendor was to execute the conveyance either in favour of the purchaser or of those pointed out by him. This last provision cannot mean that the purchaser had a right to make the vendor part with his land in parcels to third parties for an apportioned amount of the purchase money; its only effect was to oblige the vendor on payment of the purchase money to execute separate conveyances of different parcels of the land if the vendor so

1. (1905) I. L. R. 29 M. 118.
2. (1892) I. L. R. 16 M. 474.
3. (1882) 21 Ch. D. 243.
4. (1873) 8 Ch. Appeals 1022.

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desired. Subsequently to the execution of the contract the purchaser introduced one Muniya Pillai to the vendor as willing to purchase a part of the land and on the 28th of March the vendor executed an agreement to sell the land to Muniya Pillai for Rs. 12,500, Exhibit D, and subsequently executed the sale deed, Exhibit E, in his favour. It is admitted it was agreed between the original vendor and the purchaser that this was to be treated as a part performance of the contract and a part payment of Rs. 12,500 under it, but I cannot see how this transaction can have the effect of converting the stipulation for the forfeiture of the deposit into a penalty or of relieving the purchaser from the terms of his contract. It is next contended that the plaintiff is entitled to recover on the authority of *Howe* v. *Smith.*[1] I am unable to accept that contention. It is found and is clear that in this case time was of the essence of the contract, and just before the day of payment the defendant gave notice to the plaintiff that if payment was not made within the stipulated time the contract would be avoided. After that it seems to me quite clear that the purchaser was not entitled either to a decree for specific performance or to recover damages against the defendant for breach of contract. If so, according to the test laid down by *Fry* L. J. *in Howe* v. *Smith*[1] he also lost the right to the return of the deposit. Lord Justice *Bowen* treats the question as one to be determined by the intention of the parties expressed in the contract, and *Cotton* L. J. does not, in my opinion, lay down any different rule. That was a case in which, before the Judicature Act, according to the view of the Courts of Equity, time was not the essence of the contract. There was, I may observe, no express provision for forfeiture or non-payment of the purchase-money on the due date, and it was even provided that if not paid on the due date it should bear interest. On the Common Law side, however, time was regarded as of the essence of such contracts and the effect of the Judicature Act was to substitute the Equitable for the Common Law rule. As there time was not of the essence of the contract, in that case, the vendor was not entitled to rescind for mere non-payment on the appointed day; and even delay which might disentitle the purchaser to specific performance might not, in Lord Justice

1. (1884) 27 Ch. D. 89 at p. 110.

Cotton's opinion, in some circumstances be sufficient to entitle the vendor to retain the deposit; in such a case there must be something more which would amount to a repudiation by the purchaser, and entitle the vendor to treat the contract as rescinded and retain the deposit. This, however, is no authority, in my opinion, for the proposition that where time is of the essence of the contract and the vendor owing to non-payment is entitled to treat the contract as rescinded and does so, he is bound to return the deposit.

In re Scott and Alvareyy's Contract[1], *Lindley* L.J. held that the Judicature Act made no difference as to the right of a purchaser to maintain a suit for the recovery of his deposit, which must still be governed by the terms of the contract. "It appears to me the purchaser would fail if he brought an action at law to recover his deposit; and I must say I think the case, Mr. Farwell has referred to, of *Corral* v. *Cattell*[2], is decisive on that point. The legal answer is this: 'There is no breach of contract at all; you have taken your chance with respect to your deposit; and unless you show a breach by the vendor of his bargain, you are not entitled to have that deposit back.'" It all comes back to this, that, as laid down by Sir *George Jessel*, stipulations for the forfeiture of deposits are not penalties and must be enforced according to the terms of the contract. As regards the case *Jackson* v. *De Kade*[3], which is not fully reported, it is sufficient to distinguish it from the present case, that in that case there was no condition for forfeiture of the deposit, and it is unnecessary to consider how it is to be reconciled with the case of *Howe* v. *Smith*[4] especially as it was the case of a vendor who, after obtaining a decree for specific performance, came to the Court and asked for rescission.

As regards Indian cases, I have already referred to the case of *Srinivasa* v. *Rathnasabapathy*[5] and the case of *Maniam Patter* v. *The Madras Railway & Co.*[6] The case of *Luchman Das* v. *Chaler*[7] was not a case of deposit. *Bishan Chand* v. *Rada Kishan Das*[8] and the case of *Balvanta Appaji* v. *Bhatuar*

1. (1895) 2 Ch. 603 at p. 612.
2. (1839) 4 M and W. 734.
3. (1904) W.N. 168.
4. (1884) 27 Ch. D. 89 at p. 101.
5. (1892) I.L.R. 16 M. 474.
6. (1905) I.L.R. 29 M. 118.
7. (1887) I.L.R. 10 A. 29.
8. (1897) I.L.R. 19 A 89.

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Bira[1] are in accordance with the view taken in this judgment. I would, therefore, allow the appeal and dismiss the suit with costs throughout.

Sankaran Nair J.

Sankaran Nair J.—The question is whether the plaintiff is entitled to recover the deposit. The plaintiff agreed on the 24th of February 1903 (see Exhibit A) to purchase certain lands from the defendant for Rs. 41,000, "out of which" a sum of Rs. 4,000 was paid "as advance" on that date to the defendant. Rs. 17,000 was to be paid before the 24th of May. The defendant agreed on such payment to execute the sale-deed; and for the balance of Rs. 20,000 the plaintiff undertook to execute a bond hypothecating these properties to the defendant. The plaintiff was to forfeit the abovesaid amount of advance if he failed to pay before that date and obtain the sale-deed. If there was a delay on the part of the defendant to execute the sale-deed "before the due date," he was to return the deposit with an additional sum of Rs. 4,000. The plaintiff now claims specific performance or the return of the deposit. The claim for specific performance is disallowed by the Subordinate Judge as he held that time was of the essence of the contract and the defendant was, therefore, entitled to rescind the contract on the expiry of the stipulated time and that he rescinded it. The claim for the return of the deposit has been allowed. The defendant appeals.

It is admitted that the plaintiff entered into the contract not for purchasing the properties for himself but for selling the lands piece-meal at a profit to third parties. He was to introduce intending purchasers to the defendant and the agreement of the 24th February 1903, provided that the defendant was to execute the conveyances in their favour. On the 28th March 1903, the defendant agreed to sell (Exhibit D) to one Muruga Pillai, some of the lands in Exh. A for Rs. 12,500 of which Rs. 3,000 was then paid. Rs. 4,000 was to be paid on the 31st May 1903, when the defendant was to execute the conveyance, and the rest was to be paid in two years. On the 30th May the sale-deed was executed. On 15th May the defendant warned the plaintiff that there was only one week more for the expiry of the time under (A) and that the transaction must be concluded before that date. The

1. (1897) I.L.R. 23 B. 56.

sale not having been effected on the 24th, or the 25th, the defendant rescinded the contract and informed the plaintiff that he had forfeited the deposit. On the 22nd July the defendant sold some lands Rs. 20,000 (H) to one Aghorappier and on the 5th August some other lands for Rs. 12,500 (F) to one Muthukumara Pillai and there was also a subsequent sale for Rs. 200 to another person. In addition to the deposit the defendant has, therefore, realised Rs. 45,200.

It is admitted that the sale to Muruga Pillai under D and E was in pursuance of the contract. It is found by the Subordinate Judge, and we agree with him in that finding, that the subsequent sales were not in performance of the original agreement (A). He also finds that though the subsequent sales were not brought about by the plaintiff on account of the defendants' rescission of the contract "he did something in the way of recommending the purchases by those vendees;" and he further found "it cannot be said in these circumstances that plaintiff has wholly and absolutely failed to carry out his part of the agreement."

It is not in fact contended that the defendant has actually sustained any damage by reason of the breach of contract by the plaintiff or by its rescission by the defendant. He does not claim any damages. The only question, therefore, for consideration is whether the defendant is not entitled to retain the deposit under the terms of the contract.

It appears to me that the English cases lay down the rule that to forfeit the deposit it must appear that not only has the contract not been performed within the time specified, but the defaulting party has no intention of performing the contract or that he repudiates it; and that where the vendor rescinds it before the purchaser abandons or repudiates the contract, he is not entitled to retain the deposit—see *Howe* v. *Smith*.[1] *Cotton* L. J. says: "There must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance but which would make this amount to a repudiation on his part of the contract." *Bowen* L. J. says: "It is obvious that the party may lose his right to insist on specific performance before an equitable tribunal without at the same time having necessarily so acted as to justify the other side in

1. (1884) 27 Ch. D. 89 at p. 101.

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saying that the contract is altogether at an end. We have to look to the conduct of the parties and to the contract itself, and, putting the two things together, to see whether the purchaser has acted not merely so as to break his contract but to entitle the other side to say he has repudiated and no longer stands by it."

So, *Fry*, L. J., referring to the 25th section of the Judicature Act of 1873, says: "The effect of this clause is, in my opinion, that the purchaser seeking damages is no longer obliged to prove his willingness and readiness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time after the stipulated day. If before the lapse of such reasonable time or repudiation by the purchaser the vendor rescinds the contract he cannot retain the deposit."

Thus in SUGDEN'S *Vendors and Purchasers*, 14th Edition, page 22, "a stipulation in a contract that in case the vendor cannot deduce a good title or if the purchaser cannnot pay the money on the appointed day, the agreement shall be void, does not enable either party to avoid the agreement by refusing to perform his part of it; the seller may avoid the contract if the purchaser do not pay the money. *And if he, the vendor, insist that he has the right to rescind the contract, he cannot at the same time retain the deposit*"—*Morley* v. *Cook*[1]. So in FRY on *Specific Performance*, 3rd Edition, S. 1487, it is stated that the vendor is entitled to retain the deposit "where the purchaser unjustifiably repudiates the contract or it in any other way goes off through his default." Neither under the Indian Contract Act nor in English Law, as pointed out by *Fry* L. J., in the extract from his judgment already quoted, does the contract go off merely by non-payment before the stipulated time. So the two conditions are: (1) the contract must go off, and (2) going off must be due to the purchaser's default, which must be something else than non-payment. *Farwell* J., in *Jackson* v. *Dekadie* [2] also was of opinion that the vendor cannot have rescission and at the same time damages for the breach of the contract. In *Howe* v. *Smith*[3] and the other cases, there was either abandonment or repudiation of the contract by the purchaser before the vendor sold the lands.

It is clear, therefore, the defendant is not entitled to retain

1 (1842) Hare 110. 111. 2. (1904) W. N. 168.
3. (1884) 27 Ch. D. 89.

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the deposit, because the plaintiff never abandoned the contract or repudiated it, and the defendant rescinded it on the 25th May though the plaintiff was entitled to perform the contract within a reasonable time after the 24th. Moreover, the plaintiff's conduct, it is found by the Subordinate Judge, shows his willingness to carry out his promise after that date. In all the cases cited where a party has been allowed to retain the deposit, the other party has failed to perform the contract within a reasonable time after the stipulated time or has by his conduct shown that he has refused to perform the contract and repudiated it.

The breach of the contract, the failure to perform on or before the specified date, clearly entitles the defendant to compensation under Sections 73 and 74 but the contract still subsists and the question whether the deposit is forfeited cannot arise till the determination of the contract.

The appeal, in my opinion, fails on this ground.

Again, if we have to decide this case with reference to the ordinary rules which distinguish in English Law a penalty from liquidated damages, then it appears to be clear that this provision must be treated as a penalty. Thus, supposing in this case the agreement was carried out before the 24th May, except as to the item last sold for Rs. 200, or supposing there was a piece of land worth only Rs. 5 to be sold, then the stipulation that the plaintiff is to lose his deposit of Rs. 4,000 must be treated as a penalty according to the rule in *Kemble* v. *Farren*[1] in which it was held "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered to be a penalty appears to be a contradiction in terms, the case being precisely that in which the Courts of Equity have always relieved."

The same rule is thus stated by *Cotton* L. J. in *Wallis* v. *Smith*[2]; "That comes within the same principle as where the Courts have interfered, where one of the covenants has been for payment of a sum of money when the damage is capable of being assessed accurately and is very much below the sum named." The case of *Betts* v. *Burch*[3] is in point. In *Betts* v *Burch*[3] the plaintiff agreed to sell and the defendant to purchase some property of which possession was to be given on or before the 13th

1. (1829) 6 Bing 141. 2. (1882) 21 Ch. D 243.
3. (1859) 4 H. and N. 506.

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October and in the event of either party not complying with *every particular set forth* in the agreement the defaulter should forfeit and pay the other £50. The plaintiff sued to recover the amount as he alleged the defendant broke the agreement and did not take posssion. It was held that the plaintiff was not entitled to recover. Baron *Martin* said: "The plaintiff's counsel have established that the same construction must be put on the agreement for both parties. Now, as that is so, it would follow, if the contention contended for on the part of the plaintiff were to prevail, that if a very small part of the price were unpaid the defaulter would be liable to the penalty of £50. The cases are too strong, and I am bound to say that this is a penalty, *i. e.*, as pointed out by Lord *Lindley* in *Wallis* v. *Smith*[1] the £50 would be payable even though £1 only might be unpaid."

In this case there was no deposit. But there is no reason why the case of deposits should be treated as an exception to the general rule. See *In re Dagenham (Thames) Dock Company; Exparte Hulse*[2] which is an instance of a successful attempt to recover back the deposit money. In that case a Company agreed to purchase land for £4,000 and deposited £2,000: the remaining £2,000 was to be paid on a day named in the agreement with a provision that if the *whole of* £2,000 was not paid on that day, the vendors were to repossess themselves of the land without any obligation to repay the deposit. The time was extended by an agreement which provided that the £2,000 with all interest should be entirely paid and discharged before a certain date. This was held to be a penalty. The reason is thus stated : "When you look at the last agreement it provides that if the whole £2,000 with interest or any part of it, however small, remains unpaid after a certain day, then the Company shall forfeit the land and the portion of the purchase-money they have paid." This case also treats a deposit as damages payable by the defaulting party and applies to it the rule that the stipulation which provides for payment of a sum of money larger than the amount payable by the defaulting party is a penalty.

With reference to this case Mr. Krishnaswamy Iyer contended that if it in any way supports the respondent's contention, it

1. (1882) 21 Ch. D. 243.
2. (1873) 8 Ch. 1022.

is opposed to the more recent cases in which it has been held that a deposit is not only a part payment but a security for the performance of the contract and, therefore, is liable to be forfeited on failure to carry out the contract.

I shall refer to some of those cases though it has to be remembered that they cannot throw light on the Indian Contract Act passed long before.

It is, no doubt, often said on the authority of the decisions referred to by Mr. Krishnaswami Aiyar that the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit. But this is so on the ground that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, the parties may fix a given amount to avoid the difficulty. The rule, therefore, does not apply to cases where the damages may be accurately estimated. It does not get rid of the rule that where the provisions of the contract show the stipulation to be only a penalty, it must be treated as such and should not be enforced. The deposit will not then be forfeited. I shall refer to a few cases that lay down that rule, drawing attention in particular to the law as it was understood before the Indian Contract Act (1872).

The case of *Palmer* v. *Temple*[1] decides that where there is no forfeiture clause the fact that it is a deposit does not necessarily show that the amount is forfeited and not to be returned and when the party who holds the deposit is entitled to claim damages, he must hold it to the use of the other party reducing the damages to that extent, if he is entitled to recover more than the deposit. This seems reasonable, because if it is absolutely forfeited, it cannot go in reduction of damages. The deposit, according to this case, therefore, is really the damages payable by one to the other, as settled by the parties themselves by their agreement.

The case that will be next referred to, *Hinton* v. *Sparkes*,[2] where there was forfeiture clause, makes this quite clear. The agreement in that case contained the stipulation that as earnest

1. (1839) 9 A. and E. 508. 2. (1868) L. R. 3 C.P. 161.

of an agreement for the purchase of a public house "the purchaser has paid into the hands of the vendor £50 which is to be allowed in part-payment at the completion of the agreement and if the purchaser shall fail to perform his part of the agreement then the deposit money shall become forfeited, in part of the following damages; and if either of the parties neglect or refuse to comply with any part of the agreement he shall pay to the other £50, hereby mutually agreed upon to be the damages actually ascertained and fixed on breach thereof." As a fact the sum of £50 was not paid but the purchaser gave only an I. O. U. for the amount, but the Judges held that this made no difference. The purchaser made default and the vendor claimed the amount. The Chief Justice was of opinion that so far as the stipulation that £50 shall be the damages, ascertained and fixed was concerned that was not in the nature of a penalty.

Palmer v. *Temple*[1] was distinguished on the ground that there was no condition of forfeiture; and it was held that as there was a stipulation that the money was to be forfeited, the vendor was entitled to the amount of the deposit represented by the pro-note. In that case on behalf of the vendor the contention was that the £50 was recoverable as liquidated damages and the purchaser pleaded that it was a penalty and apart from the claim on the ground that there was an I. O. U. the only question was whether the £50 was a penalty or liquidated damages and in the course of the argument, *Bovill* C. J. remarked: "Is there any case where money deposited, as in this case, has been treated as a penalty and not as a liquidated sum," and he was of opinion that the cases cited showing the distinction between penalty and liquidated damages have no application to a case where the agreement contains a stipulation of forfeiture. From the observation made in the course of the argument and the arguments in the case it is clear that the case of a deposit with a condition of forfeiture was not treated as has been erroneously assumed, as not falling within the class of cases which turn upon the distinction between penalty and liquidated damages. *Wikes*, J. pointed out: "In the event of the purchaser's default the deposit is to be forfeited, and there is abundant reason for

1. (1839) 9 Ad. & E. 508.

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supposing that the parties meant that the damages as against the purchaser should be the sum they have set down."

In my opinion there is a clear authority for the position that the reason why the purchaser is to forfeit the deposit is that it is to be taken as the damages payable by him. So too in *Lea* v. *Whitaker*, [1] all the three Judges concurred in laying down the same principle, that the intention of the parties must be pursued and where the language of the stipulation shows that the deposit was the agreed amount of damage, then the party committing the breach of the agreement is not entitled to recover his deposit.

The other party retained it as the liquidated or estimated damages to be retained by the other.

These decisions were before or about the time of the Indian Contract Act. In *Wallis* v. *Smith*[2] the plaintiff agreed to deposit £5,000 by payment to the Bankers to the joint account of the plaintiff and the defendant. *Fry* J., after referring to the authorities above cited, held " these authorities are very strong to show that where a deposit has been placed in the hands of a third person and that is primarily the fund for the payment of the sum in question, that sum is liquidated damages; and not a penalty. That applies strongly to the present case."

In appeal *Jessel*, M. R., classified the decisions and laid down four propositions to determine whether a stipulation is a penalty or forfeiture.

Referring to deposit as one of such cases *Jessel* M. R. says: " I now come to the last class of cases. There is a class of cases relating to deposit where a deposit is to be forfeited for a breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day ; in all those cases the Judges have held that this rule does not apply and that the bargain of the parties is to be carried out."

The opinion of *Cotton* L. J. has been already cited. He evidently was of opinion that the rule that a covenant to pay a sum of money where the damage is capable of being assessed accurately and is very much below the sum mentioned must be treated as a penalty applied to the case of a deposit also. But he

1. (1872) L.R. 8 C. P. p. 71.

2. (1882) 21 Ch. D. 243.

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held that on the facts this principle was not applicable and that the sum of £5,000 mut be treated as liquidated damages.

Lindley L.J. also held in that case which was one of deposit that "it has long been settled that where a person agrees to pay a larger sum if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect one would suppose it was intended to have." In that case, in his opinion, the damage could not be ascertained. This case also supports the view that a deposit can be retained only as liquidated damages but " where the damage can be small or trivial" or ascertainable and is less than the deposit, then it has to be treated as a penalty.

In *Howe* v. *Smith*,[1] it was held that a deposit is not only a part payment but is also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. The Judges also agree that the question is one of construction of the document to discover the intention of the parties. *Palmer* v. *Temple*[2] was for this purpose relied upon, and *Fry*, L. J., says that if the intention is not expressed they have to enquire what terms are implied.

The only other English case that need be referred to is the case *Soper* v. *Arnold.*[3] Lord Macnaughten stated therein : " The deposit serves two purposes. If the purchase is carried out it goes against the purchase-money, but its primary purpose is this, it is a guarantee that the purchaser means business ; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not." In this case there was a stipulation that the purchaser should forefeit the deposit.

It will be observed that there is a distinction between these cases and the case *In re Dagenham (Thames) Dock Company*; *Ex parte Hulse*[4]. In the later case, the deposit was to be forfeited for non-payment of a smaller amount which did not appear to be so in the other cases.

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1. (1884) 27 Ch. D. 39.
2. (1839) 9 A. & E. 508.
3. (1889) 14 App. Chs. 429.
4. (1873) 8 Ch. 1022.

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As pointed out by Mr. Mayne with reference to *Wallis* v. *Smith*[1] the forfeiture of the deposit for non-payment on a certain day is apparently due to the fact that the damages resulting therefrom cannot be accurately estimated or any lesser sum apportioned as payable in the event of a breach—Mayne on Damages 7th Edition, page 160. The rule laid down in *In re Dagenham (Thames) Dock Company : Ex parte Hulse*[2] is not, therefore affected by these later decisions.

Thus it appears to me that though the English Law in 1872, when our Act was passed, treated the question whether the payer is entitled to recover the deposit or not, as turning upon the intent of the parties to be collected from the whole instrument, that intent was often different from what the words in the natural sense conveyed. The cases decided that certain words in certain events bear a particular meaning : and it was assumed that when the parties entered into the contract knowing that the Courts would attach such special meaning to these words, the parties must have used those words in the sense in which the Courts understand them, though on the face of them, they may have a different meaning.

One of the artificial rules so laid down to discover the intent is that where there is a deposit made under a contract for a sale of land, and the contract is repudiated, then the deposit is to be treated as liquidated damages not recoverable by the repudiating party, because in such cases it is difficult to assess accurately the damage sustained. Even in the case of a deposit, if such an intention cannot be gathered from the document as a whole,it will be treated only as a penalty—*Palmer* v. *Temple*[3]—or if the deposit is larger than the amount ascertained to be due. See *In re Dagenham* v. *(Thames) Dock Company : Ex parte Hulse*[2] and *Wallis* v. *Smith*[1], then also it will be deemed a penalty.

The real object of the Courts of Equity was to relieve parties from their oppressive contracts. It was felt that while a party to a contract is entitled only to the specific performance of his contract or for damages which he may have sustained on account

1. (1882) 21 Ch. D. 243.
2. (1873) 8 Ch. 1022.
3. (1839) 9 A. D. and E. 508.

of non-performance, it is inequitable to allow him to derive any undue benefit far in excess of any damage he may have sustained, though the parties may have expressly stipulated to that effect.

So these rules of construction were adopted. The question is whether the Indian Contract Act adopted this theory of a fictitious intention to be discovered by these extremely artificial rules of construction, which have perplexed English lawyers themselves, or laid down the simple rule that where a contract is broken, the damages alone shall be assessed and paid, and laid on the Courts the task in all cases of assessing the damages.

It is, no doubt, in appellant's favour that the Indian cases generally discuss the question only with reference to the rules laid down in the English cases and, with one exception, the Contract Act is not even referred to. I shall refer to a few of the cases cited. In *Srinivasa* v. *Rathnasabapathy* [1] the suit was brought by a purchaser of the interest of a contractor who had deposited a certain sum of money with a Municipal Council under a contract which provided that the deposit should be forfeited on any default made by him in performing his contract. The contractor failed to perform the contract and the deposit was declared forfeited. In a suit by the purchaser it was held that the stipulation of forfeiture was in the nature of a penalty as it made the deposit liable to be forfeited, irrespective of the importance of the breach and was not enforceable. The purchaser got a decree for the amount. The case of *Luchman Das* v. *Chaler*[2] and apparently the case of *Howe* v. *Smith*[3] [*Soper* v. *Arnold*[4] seems to be a mistaken reference of the Reporter] were relied upon. It is important that in this case there was no claim for damages by the Municipality and that claim was not considered.

The next case is *Manian Patter* v. *The Madras Railway Company*[5].

That also was the case of a contractor who deposited a certain sum of money with the Madras Railway Company, which was liable to be forfeited on the contractor's default. The rule laid down in that case by Subramania Aiyar J. and myself was that the forfeiture will not be interfered with, if the amount

1. (1892) I.L.R. 16 M. 474.
2. (1887) I.L.R. 10 A. 29.
3. (1884) 27 Ch. D. 89.
4. (1889) 14 A. C. 429.
5. (1905) I.L.R. 29 M. 118.

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deposited was reasonable in amount, and as it did not appear unreasonable the forfeiture was upheld.

On further consideration I do not think that this view is inconsistent with the decision in *Srinivasa* v. *Rathnasabapathy*[1]. Both of them are clear authorities against the appellant's contention that on breach of the contract the deposit is unconditionally forfeited. They in effect decide that it can only be claimed as damages. In *Manian Patter* v. *The Madras Railway Company*[2] it was further held that it may be presumed to be the reasonable amount of damages which a Court ought to award, a presumption which may be rebutted by evidence. Where damages are not claimed, or, they are less than the deposit, then it is unreasonable to enforce the deposit. This alone was necessary for the decision. The reasonableness or otherwise of the amount depends upon the nature of the loss sustained. In the present case no loss has been sustained and no damages claimed. There are also certain observations, to which, so far as they are inconsistent with this judgment, I do not now adhere.

In *Lachman Das* v. *Chaler*[3] the case which was followed in *Srinivasa* v. *Rathnasabapathy*[1] the entire amount in an administration bond became payable on breach of any of the conditions of the bond. The bond was executed and the stipulation was made to secure the due performance of the contract to exhibit in Court a true inventory of the estate and for the due collection and administration of the estate according to law. It was held that the stipulation though made as a guarantee for performance, was a penalty and that the plaintiff was only entitled to damages, and as he had not suffered any, the plaintiffs claim was disallowed.

However, in *Bishan Chand* v. *Radha Kishan Das*[4] the learned judges following *Ex parte Barrell*; *Parnell, In re*[5], and *Howe* v. *Smith*[6] held that the plaintiff was not entitled to recover a deposit after he has repudiated the contract for a sale of land.

So far the decision is consistent with authorities. But they apparently proceed further. The defendant therein claimed only

1. (1892) I.L.R. 16 M. 474.
2. (1905) I.L.R. 29 M. 118.
3. (1887) 10 A. 29.
4. (1897) I.L.R. 19 A. 89.
5. (1875) L.R. 10Ch. 512.
6. (1884) 27 Ch. D. 89.

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Rs. 2,000 as damages and the Judges held that he was entitled to recover the full deposit of Rs. 6,500 even though he admitted that his damages amounted to only Rs. 2,000. The observations of the learned Judges fully support the appellant.

In *Ibrahimbhai* v. *Fletcher*,[1] there was a defect of title and the question, therefore, really did not arise for decision. In *Balvanta Appaji* v. *Bhatkar Bira*[2] following *Howe* v. *Smith*[3] it was held that where the contract goes off on account of the purchaser's default he forfeits the deposit.

It will be noticed that all these decisions purporting to follow the English rulings arrive at conclusions not easily reconcilable with one another.

I shall now consider the provisions of the Indian Contract Act. Under that Act, if a party fails to perform his promise before the time specified, the contract does not become voidable if time is not of the essence of the contract, the only result of the failure being that he becomes liable to pay compensation. To enforce a stipulation of forfeiture of deposit seems obviously inequitable unless, of course, we adopt the rule that, however oppressive, the terms are to be strictly carried out in all cases of deposit. If time is of the essence of the contract then the contract only becomes voidable at the option of the other party, but till he exercise his option the contract subsists so far as specific performance is concerned as before (Section 55). Sections 73 and 74 are intended to get rid of the distinctions between penalties and liquidated damages and it appears to me that Section 74, as amended by Act VI of 1899, shows with sufficient clearness that a deposit, as such only, is not forfeited by any breach of contract. That section provides 'that if the contract contains any other stipulation by way of penalty, reasonable compensation must be awarded not exceeding the penalty stipulated for'. If the deposit is treated only as part payment, it is not contended—and the authorities are clear that it is not forfeited.

The decisions uphold the forfeiture on the ground of its being a guarantee for the due performance. The word 'penalty' in this section means any provision intended to compel the performance of a contract and hence includes a deposit. The argument

1. (1896) 21 B. 827 at p. 853. 2. (1897) I.L.R. 23 B. 56.
3. (1884) 27 Ch. D. 83.

that if a deposit is not forfeited, it ceases to be security for the performance of any contract would apply with equal force to every stipulation which is not enforced on the ground of its being a penalty. The provision that he will get something less than the deposit is inconsistent with the view that he is entitled to retain the whole deposit. Where a person at whose option, under S. 55, a contract is voidable rescinds it, while he gets compensation under Sections 73 and 74 for the breach, he has to restore any benefit so far as may be to the other party (Section 64), the object being to replace the parties in the position which they occupied before the contract was made. The deposit has *prima facie*, therefore, to be restored under this section. This is consistent with the rule of English Law that where there is no abandonment or repudiation of the contract by the purchaser and the vendor puts an end to the contract, he cannot claim to retain the deposit. It was argued that Section 64 applies only to contract voidable under Sections 19 or 19 A. Section 55 shows that the contracts referred to therein are voidable, and I see no reason to limit the operation of the section as suggested.

It was then contended that this is not a benefit derived under the contract. I am unable to accept this contention either. If not a part of the contract there is no fresh consideration and a promise to fulfil a pre-existing obligation cannot be a consideration.

There is in fact only one contract. The deposit is also part of the consideration. If it be a different contract then the forfeiture must be absolute which, it is admitted, is not the case, as it will go in reduction of damages or will be treated as part payment if the sale is subsequently carried out. It stands on the same footing for this purpose as the stipulation by the defendant to pay Rs. 4,000 to the plaintiff on his default. That cannot be a different contract and is clearly only a penalty. Not only deposits but penalties also may be enforced on the same ground. If we uphold this contention of the appellant, we shall have to declare those deposits forfeited, which are only penalties according to English decisions and also in cases where there is no repudiation. The section also recognises no difference between deposits for sales of land and for other purposes; nor between contracts in which time is of the essence and others.

atesa Aiyar v. Appavu Padayachi — Wallis J.

It was also argued that it is open to a party to waive the benefit of any provision of law in his favour and as the plaintiff has agreed to forfeit the deposit, the stipulation must be enforced. This argument would apply to every penalty. These sections are intended to prevent a party from enforcing the express provisions of his contract and, therefore, that there is such a stipulation is no reply. See section 1 of the Contract Act. My conclusions are:—According to the English decisions where there is a deposit by a purchaser under a contract of sale of land, the deposit is not forfeited by him; where there is no repudiation or abandonment of the contract by him, and where the vendor rescinds it before the contract is put an end to by the purchaser, he cannot retain the deposit.

Where the damage sustained can be assessed and it is below the deposit amount it will not be forfeited. I think *Srinivasa* v. *Rathnasabapathi*[1], is rightly decided. Under the Indian Contract Act the vendor can recover only the damages sustained by breach of contract and if he rescinds the contract he must restore the deposit.

As in this case no damage has been sustained and there is no plea to that effect, I would dismiss the appeal with costs.

Wallis J.—As my learned brother is in favour of confirming the judgment, the appeal is dismissed with costs.

The memorandum of objections is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Muthukana Ana Ramanadhan Chettiar .. Appellant* (*Plaintiff*)

v.

Vada Levvai Marakayar and others .. Respondents. (*Defendants* 1 *to* 5 *and* 7 *to* 21.)

Ramanadhan Chettiar v. Vada Levvai. Marakayar.

Mahomedan Law—Wakf—Construction—Illessory wakf Superstitious uses—Fatehas, performance of—Failure of some of several objects, effect of—Perpetuities.

The performance of fatehas in so far as it involves the expenditure of any money in feeding the poor, is a valid object of wakf.

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* S.A. 852 of 1906. 28th February, 1910.

1. (1892) I.L.R. 16 M. 474.

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It is not an objection to the validity of a wakf that some provisions are made in the deed of wakf for the benefit of the donor's family, provided such provisions are not inconsistent with the gift being one substantially for charity, and this question has to be decided in each case with reference to the terms of the particular deed. If the provisions for the donor's children and descendants in a deed purporting to be by way of wakf exhaust the bulk of the income and are to last for an unlimited period o time, such a wakf would be illusory.

Where a Mahomedan donor mentions several purposes as objects of his bounty and one of those purposes fails, if a general intention can be gathered from the deed dedicating the property to charity, the entire property is to be devoted to the lawful objects of the wakf, if any, mentioned in the deed, and in the absence of any such object being specified, to the poor, whether a definite portion of the income has been set apart for the objects which fail, or not; and it makes no difference in principle to what the failure is due.

The expression of a general charitable intention need not be in any particular form of words.

Meaning and use of words "Wakf" and "Sadaat" explained.

Held, also that the deed of endowment in the case was not bad.

Held also on a construction of the deed in the case:—That the intention apparently is that the charitable objects mentioned are in the first place to be benefitted and if any surplus is left it is to be divided among the heirs whom also the donors, though, no doubt, wrongly, supposed to be proper objects of the gift; that the trustees were not meant to have unfettered power and that the intention of the donors was that the trustees should treat the different objects of the donor's bounty according to the rate provided by law, *i.e.*, equally; that the salary provided for the dharmakartas was not unreasonable and that the direction to accumulate one third of the income was intended for the benefit both of the charitable purposes mentioned as well the heirs.

Held also:—That the wakf was valid; that the income of the property was to be devoted for the benefit of objects mentioned in the deed other than the "heirs" of the donors; and that the provision for accumulation which would enure solely for the benefit of charitable purposes in the above view did not offend against the law of perpetuities.

Second Appeal from the decree of the District Court of Tanjore in A. S. No. 323 of 1901, presented against the decree of the Court of the Subordinate Judge of Negapatam in O. S. No. 62 of 1898.

Suit for a declaration that plaintiff is entitled to attach and bring to sale certain properties claimed by the defendants to be wakf property. The deed under which the defendants claim was in these terms:—"Trust deed executed by (1) Ahmed Nayna Markayar * * (2) Hassin Kuthu Sahib to two persons, *viz.*, (1) Vava Marakayar (2) Mahomed Nayna Marakayar:—

"As we have given up with our full consent the undermentioned two villages worth Rs. 20,000 (twenty thousand) for the purpose of charity, you should annually pay from out of the income

of the said properties, the Melvaram, repairs, salaries for servants, Maganam and other important expenses and for one share out of the balance you should purchase such immoveable property as would yield income for carrying out the said charity and add (it). From the remaining two shares each of you and your successors should take as salary Rs. 10 per mensem for discharging the said duties. From the balance you should perform annually without failure the annual Pattah, Kuthum, etc., for our ancestors and for us, after decease.

"You should annually give in the month of Ramezan to the Mesukins, Ojivanam Noumanam, Sathakka, Jakath, etc. The surplus should be divided in equal shares once a year without distinction of sex between our heirs, or their sons, grandsons, in existence from generation to generation inclusive of you. The properties purchased subsequently and the income thereof should be added as said above to the said charity properties and be dealt with according to the above terms. If, in any year no immoveable is purchased for the $\frac{1}{3}$ amount and added as stated above that $\frac{1}{3}$ amount also should be added to the said $\frac{2}{3}$ amount and the balance that remains after the expenses should be divided according to the particulars above. You and after you such persons as are males in our family honest and competent to manage not exceeding 3 in number according to seniority, should be the Dharmakartas for the said properties and conduct all business. If any heirs entitled to a share should ask, you are to give them correct accounts at their expense. In case you or the Dharmakartas succeeding you should mismanage or cause to be mismanaged, the heirs who are entitled to a share may remove the said Dharmakartas and appoint other Dharmakartas in the said position. You or the Dharmakartas who are your successors subsequent heirs or other heirs who succeed them hereditarily are entitled to obtain from time to time only the shares due to you out of the said properties subsequently added the rights thereof and the income thereof but are not entitled to sell, mortgage, give them as security or charity or dowry or hippath or have any other use of them. The batta expenses, etc., of those who are doing work in the said village should be met from the salaries of those persons. For debt and other claims due by any persons who are entitled to a share the said property or the incomes thereof

or the rights thereof cannot be liable. To this effect have we delivered up with our full consent the said properties to you this day." Ramanadhar Chettiar v. Vada Levva Marakayar.

Plaintiff's case in respect of the deed was that the deed was a colorable one brought about with a view to defeat creditors; that it created a perpetuity; that it was void for uncertainty as the amounts to be spent in respect of each charity is not mentioned; that Fatia is not a charity according to Mahomedan Law, nor provision for the maintenance of the descendants of the settlors.

The contention of the defendants was that it was valid wakf conceived *bona fide* and not with a view to defraud creditors. Rs. 360 being found to be the amount customarily spent by the settlor on charity, the Subordinate Judge upheld the wakf only to the extent of a charge of Rs. 600, *i.e.*, the expenses by the charity and the mutwalli's pay, as the dedication could not be said to be a substantial dedication to charity. On appeal the District Judge upheld the deed wholly on the ground that the dedication was substantial as it was. Hence the appeal.

S. Srinivasa Aiyangar and *A. Nilakanta Aiyar* for appellant.

L. A. Govindaraghava Aiyar and *Sitarama Rao* for *P. R. Sundara Aiyar* for respondents.

S. Srinivasa Aiyangar (with him *A. Nilakanta Aiyar*) :— The settlement evidenced by Ex. I. is liable to be avoided at the instance of the settlor's creditors. The settlors were indebted at the time of the execution of the deed. They were moreover, engaged at the time in a risky trade. The settlement was voluntary. [*Court.*—This is a question of fact and you can't go into it in second appeal.] My next point is that the wakf deed Ex. I is void for indefiniteness and uncertainty. It does not set out what portion of the income is to be devoted to charity. Under the deed.—(*a*) $\frac{1}{3}$ of the income is to be utilised for the purchase of immoveable property capable of yielding income and this property is to be added to the existing property ; (*b*) out of the remaining $\frac{2}{3}$ each of the two trustees is to have Rs. 10 a month as his salary ; (*c*) out of the balance the trustees are to perform (1) the annual Fateha of the settlors and their ancestors, and (2) give cash doles to and feed the poor in the month of Ramzan ;

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the surplus is to be equally divided every year among the members of the settlors, families irrespective of sex distinction.

The trustees are not bound to expend any particular portion of the income on charity. It will not be a breach of trust on their part even if they spend only Rs. 5 every year on charity. In other words there is no legal obligation on the trustees to spend any amount for charity.

Then follow provisions entirely different. The members of the settlor's family are to call for accounts from the trustees, and to remove them in case they mismanage. The deed also prohibits alienation of the properties and says that they should not be liable for the debts of any of the members of the settlor's family. The Mutwallis under the deed should always be selected from among the members of the settlor's family. All these provisions point to the conclusion that the settlors' intention was to give the property in substance to their descendants. There was no substantial dedication to charity and the deed is therefore invalid—*Mohamad Ashanulla Chowdhry* v. *Amarchand*[1]; *Abdul Gafur* v. *Nizamudin*[2]; *Abdul Fata Mohamad Ishak* v. *Rasamayya Dhur Chowdhri*[3]; *Magibuunissa* v. *Abdur Rahim*[4]; *Mohammad Munwar Ali* v. *Ruzia Bibi*[5]; *Fuzlur Rahim Abu Ahmud* v. *Mohammad Obedul Azim Abu Hassan*[6]; *Alamgir Khan* v. *Kamerunnissa*[7]; *Mahomed Hassan* v. *Mahomed Ibrahim*[8].

Fateha is no charity—*Kaleloola Saheb* v. *Nusseeruddeen Saheb*[9]. [*A. Rahim* J.—In those cases the endowment was for ceremonies at a private tomb. They had no reference to Fateha celebrated in the house.] Moreover there is the feeding of the poor which certainly is a proper object of wakf. In the 18 Madras case also there was feeding of the poor and yet it was held that Fateha was not a proper object of wakf. My next point is that external evidence is not admissible to show how much is to go for charity. That will amount to making a new deed and not interpreting the deed of the settlor—*Muhamad Munmawar Ali* v. *Rasulan Bibi*[10]; *Fuzlur Rahim Abu Ahmad* v. *Mohamad Obedul Azim Abu Hassan*[11]; *Muhamad Ashnulla Chowdhry* v. *Amarchand*[1]; *Rai*

1. (1889) 17 C. 498; 17 I. A. 28.
2. (1892) 17 B. 1; 19 I. A. 170.
3. (1894) 22 C. 619; 22 I. A. 76.
4. (1900) 23 A. 233; 28 I. A. 15.
5. (1905) 27 A. 320.
6. (1903) 30 C. 666.
7. (1902) 4 C. L. J. 442.
8. (1903) 5 B. L. R. 624.
9. (1894) I. L. R. 11 of 231.
10. (1899) 21 A. at 338.
11. (1903) 10. 30 C. at 666 and 677.

Radha Kishan v. *Collector of Jaunpur*[1]. The case in 17 I.A. 28 is clearly distinguishable as in that case the deed itself provided that the amount to be expended for charity is to be in accordance with *custom*. The case *Pulchand* v. *Akharyar Khan*,[2] which is based on *Shaik Mahomed Ashanulla Chowdhury* v. *Amarchand*[3], is also distinguishable. There the document was of the 18th century and the whole property was dedicated for charity. No surplus was in contemplation and no gift of the surplus to the descendants. Assuming, however, that evidence is admissible, there is no evidence of any *custom* in the present case. On the evidence the amount expended for charity is only Rs. 250 out of an annual income of Rs. 1,500. This is certainly not giving the bulk of the property to charity. The amount expended for charity subsequent to the date of Exhibit I not being in excess of what used to be expended by the settlors before the settlement, the deed was not intended to have effect—*Fazlur Rahim Abu Ahmed* v. *Mohamad Obedul Azim Abu Hasan*[4]; *Muhammad Munnawar Ali* v. *Rasulan Bibi*[5].

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L. A. Govindaraghava Aiyar (for *P. R. Sundara Aiyar*) and *B. Sitaram Rao* for respondents :—(1) The dedication to charity cannot be said to be illusory. Charity is the primary object; only if a balance remains it is to be distributed amongst descendants. (2) External evidence is admissible—*Morgan* v. *Morris*[6]; *Annabai* v. *Khunji*,[7]; *Divarakanath Bysack* v. *Barroda Pershad Bysack*[8]; *Kulsom Bibee* v. *Golam Hossein Cassim*[9]. If evidence is not admissible the trust must be held good to the extent of one half—THEOBOLD ON *Wills*, p. 359. (4) If the deed is not good as a wakf it may be upheld as a settlement on the testator's descendants or as a gift to them—*Divarakanath Bysack* v. *Barroda Pershad Bysack*[8]; *Nizam Udinghulam* v. *Abdul Gafur*[10]; *Abdul Gafur* v. *Nizamudin*[11]. If the provision in favour of the descendants is bad, a trust will result in favour of the poor. The provision for charity must be upheld as a charge—*Shaik Mahomed Ashanulla Chowdhury* v. *Amarchand*[3]; *Fazlur Rahim Abu Ahmud* v. *Mohammad Obedul Azim Abu Hassan*[12]; *Bikani Mir* v. *Sheik Lal Poddar*[13]; *Nizamuddin Gulam* v. *Abdul Gafur*[10]; *Bishen Chand Balawat* v. *Nadir Hossein*[14].

1. (1900) I.L.R. 28 I.A. at 26.
2. (1896) I.L.R. 19 A. 211.
3. (1889) I.L.R. 17 I. A. 28.
4. (1903) I.L.R. 30 C. at 677.
5. (1899) I.L.R. 21 A. at 339.
6. (1858) I.L.R. 3 M. 323.
7. (1889) I.L.R. 14 B. 1.
8. (1878) I.L.R. 4 C. at 448.
9. (1905) I.L.R. 10 C. W. N. at 485 (3).
10. (1888) I.L.R. 13 B. 264.
11. (1892) I.L.R. 17 B. 1.
12. (1905) I.L.R. 27 A. 320.
13. (1892) I.L.R. 20 C. 116.
14. (1887) I.L.R. 15 C. 319=15 I.A. 1.

S. Sreenivasa Aiyangar replied.

The Court delivered the following

JUDGMENT :—The question which arises in this second appeal is whether the disposition of property contained in a document executed by two Mahomedans of the Hanafi sect, Ahmed Nayna Marakayar and Hussain Kuthu Sahib, is valid according to Mahomedan Law. The deed Exhibit I begins with a recital that the property consisting of two villages of the total value of Rs. 20,000 is given for the purpose of charity and then states that out of the gross yields the melvaram, repairs, salaries for servants, maganam, and other important expenses are to be defrayed and the balance of the income is to be divided in 3 shares. From 2 shares out of the 3 shares of the income the Dharmakartas or trustees appointed by the deed and their successors are to take Rs. 10 per mensem as salary for discharging their duties, and as regards the remainder of the two shares, the direction to the trustees is as follows.—" You should perform annually without failure the customary (not "the annual" as wrongly translated in the paper book), Pattah (meaning Fateha), Kuthum (meaning Khatam) etc. for our ancestors and for us after our decease. You should annually give in the month of Ramzan to mesakins or the poor ojinam *i.e.*, food, udumanam, *i.e.*, clothes, sadaka meaning alms, jagath, etc. The surplus should be divided in equal shares once a year by our heirs or their sons, grandsons in existence from generation to generation inclusive of you." The 3rd share of the income after paying the expenses is to be "utilized in purchasing other immoveable property which is to be added to the said charity properties and dealt with according to the above terms," and if in any year no immoveable property is bought with the one-third of the net income, the amount is to be added to the two-thirds and " divided according to the above particulars." Two sons of the two executants were appointed Dharmakartas or trustees of the deed and it is provided that their successors should be male members of the family not exceeding 3 in number ; the heirs of the donors should be entitled to call upon the trustees to render proper account of the management and to remove such of the trustees as may be guilty of mismanagement and appoint competent men in their place. The Dharmakartas and the successors, the heirs, and the descen-

dants are not to receive more than the shares allotted to them out of the income and they will not be entitled to alienate the properties nor will the properties be liable for their debts. Such is the tenor of the deed, but before considering the question how far the disposition is valid, we ought to mention that as found by both the Courts below the two executants of the document at the time of its execution were in solvent circumstances and owned properties of considerable value besides the two villages and that the gift in question was not made to defeat creditors.

In the deed itself the word "wakf" does not occur, but as the entire scheme of the disposition is to "tie up" the property in perpetuity by prohibiting alienation of it, it can only be upeld if at all as a wakf. The Mahomedan Law recognises another form of gift to charity called sadaqah, the only important distinction between it and wakf being that by sadaqah not only the beneficial interest but also the legal estate is passed to the particular charity to be held by the trustees appointed by the donor. In a wakf the legal estate or "ownership" is not vested in the Muttawalli or trustee but is so to speak transferred to God. The trustees or the beneficiaries of a wakf, therefore, are not authorised to alienate the wakf property unless especially authorised by the settlor or with the sanction of the Court in cases of necessity, and except in very especial circumstances the corpus of the dedicated property must be left intact and only the income can be devoted to the designated charitable purpose. On the other hand, when property is given by way of Sadaqah to some charitable object, the corpus itself or its equivalent, if the trustees find it proper or necessary to sell the property given in sadaqah and to convert it into some other form of property, and not merely the income is to be devoted to that object. The question, therefore, is whether a valid wakf has been created by Exhibit I.

One of the objections urged against its validity by the learned vakil for the appellant, who as a judgment-creditor of the executants of Exhibit I attached the property in execution of his decree, is that pattah or fateha, one of the objects of the gift, is a superstitious use not countenanced by the Hanafi canon law. As found upon the evidence which agrees with the general practice prevalent among Mahomedans in India, the ceremony of fateha consists in distribution of alms to the poor, accompanied

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with prayers for the welfare of the souls of deceased persons, either the prophet or other saintly personages in Islamic history or the donor's own ancestors. One would require very clear authority for the proposition that rites like these are condemned by the Mahomedan religion as superstitious, and we have not been referred to any such authority nor are we aware of any. Reliance is, however, placed on behalf of the appellant on the case of *Kaleloola Sahib* v. *Nuseerudeen Sahib*,[1] but there the main object for which the property was dedicated was of a very different character. It was "for the daily, monthly, and annual expenses of the afroesaid mausoleum (the tomb of the donor's husband) such as lighting, frankincense, flowers and salaries of the repeaters of Koran and readers of benedictions, &c., as well as for the annual fateha ceremonies of the deceased and after my death for my annual fateha ceremony." So far as it can be gathered from the report, fateha ceremonies and the reading of the Koran were to be performed at the tomb of the donor's husband and thus the learned Judges say in their judgment: "In the absence of an express authority showing that the dedication for ceremonies at a private tomb—and for that purpose only—is valid under the Mahomedan law, we do not think we ought to uphold the deed. It creates a perpetuity of the most useless description which would certainly be invalid under English Law;" and in another part of their judgment they state that "the result of an investigation of the authorities seems to be that endowments purely for purposes like the present seem to be against the principles of Mahomedan Law". We are not called upon in this case to determine how far the performance of ceremonies such as those mentioned in I.L.R. 18 Mad. is in accordance with a proper interpretation of the texts of Mahomedan law or with the spirit of Mahomedan religion, the general aim of which undoubtedly is to avoid even the semblance of all idolatrous and superstitious practices. On the other hand the fact cannot be overlooked that for a very long time in India the custom has been largely prevalent of erecting mausoleum over the remains of men of reputed sanctity and for endowing property for their upkeep and for performance of religious ceremonies at such tombs, and such endowments have been recognised by the Courts as valid under the designation of durgahs, asthanas,

1. (1894) I.L.R. 18 M. 201.

khankahs, &c. It may be said, as is no doubt the opinion of *Collins*, C. J. and *Parker*, J. in *Kaleloola Sahib's* case[1], that the Courts should not extend their recognition to endowments in connection with tombs of persons other than saints ; but at the same time it can be argued that no line of distinction can be drawn on grounds of Mahomedan religion between the two cases. It is not, however, necessary for us to express any decided opinion on the point raised in *Kaleeloola Sahib* v. *Nusurudin Sahib.*[1] We are of opinion that the performance of fatehas, which so far as it involves the expenditure of any money consists in feeding the poor, is a valid object of wakf.

The most material question is, is the wakf illusory within the meaning of the Privy Council rulings in *Mahomed Ahsanulla Chowdhry* v. *Amarchand*,[2] and *Abdul Fata Mahomed Ishak* v. *Rasamaya Dhurchowdhri* [3] and confirmed in a series of cases afterwards. The effect of the Privy Council decisions seems to be that wakf in Mahomedan law is a gift of property for charitable or pious purposes: that in this connection 'charitable,' 'pious,' or 'religious' purposes must be understood in their ordinary and natural meaning, *i. e.*, in the sense analogous to that of the English law. Aggrandisement of the donor's family or protection from poverty of the donor's descendants without any limit of time is not a charitable and pious purpose as contemplated by the Mahomedan law of wakfs ; and a gift for the benefit of a man's own family, relatives or descendants is not charitable nor pious within the meaning of the law of wakfs. That a gift to charity would be deemed to be illusory if the provisions of the deed show that such gift is not to take effect, if at all, until after an indefinite period of time, while those who are really meant to be benefitted are the donors's relatives and descendants to the remotest degree and that in such a case general expressions of piety and of charitable motives on the part of the donor are to be treated as a mere cloak to hide the real nature of the transaction. But it is not an objection to the validity of a wakf that some provision is made in the deed of wakf for the benefit of the donor's family, provided such provisions are not inconsistent with the gift being

1. (1894) I. L. R. 18 M. 201. 2. (1889) I. L. R. 17 C. 498.
3. (1894) I. L. R. 22 C. 619.

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one substantially for charity, and this question has to be decided in each case with reference to the terms of the particular deed. If the provisions for the donor's children and descendants in a deed purporting to be by way of wakf exhaust the bulk of the income and are to last for an unlimited period of time, such a wakf would undoubtedly be illusory. Nothing more definite can be deduced from the authorities. Is the gift to charity properly so called in this case, therefore, a mere make-believe? What is pointed to in support of this contention of the appellant are the provisions that the proportion of the income to be devoted to charitable purposes is not fixed so that the trustees are at liberty to devote only a nominal portion of the income to these purposes and thus make the bulk of the income available as surplus for the benefit of the heirs; that the donors intended this result is to be inferred from the fact that the trustees are to be appointed from among the heirs, and the heirs are authorized to call upon the trustees to render accounts, while outsiders are given no such authority. But we do not think that this is a fair interpretation to put on the deed. The intention, so far as it is expressed, apparently is that the charitable objects mentioned are in the first place to be benefited and if any surplus is left it is to be divided among the heirs whom also the donors, though no doubt wrongly, supposed to be proper objects of the gift. The non-ascertainment of the proportions in which the different objects are to be benefited leaves it to some extent to the discretion of the trustees to determine the amounts to be spent on each object. But does the discretion extend so far as to enable them not to give any portion of the income or merely a nominal amount to any particular object or objects mentioned. There is nothing in the deed which would justify us in saying that the trustees were meant to have such unfettered power; and the donors must therefore be presumed to have intended that the trustees should treat the different objects of the donors' bounty according to the rate provided by law in such cases, *viz.*, by dividing the income equally among the several objects mentioned. We do not think that the provision for the selection of the trustees from among the heirs of the donors, which is an usual provision in deeds of endowment in this country and the fact that power is conferred on the heirs who are given an interest

in the settlement to call for accounts from the trustees— not that members of the general public or the Court are excluded by anything in the deed from interference in case of mismanagement— are sufficient to indicate that the real intention of the donors was other than what is expressed. And we may say that, in our opinion, the salary provided for the Dharmakartas is not unreasonable and the direction to accumulate one third of the income is intended for the benefit both of the charitable purposes mentioned as well as the heirs.

What then is the rule of Mahomedan law applicable to a case in which the donor mentions several purposes as objects of his bounty and one of those purposes fails? The rule is that if in such a case a general intention can be gathered of dedicating the property to charity the entire property is to be devoted to the lawful objects of wakf, if any, mentioned in the deed, and in the absence of any such object being specified, to the poor, whether a definite portion of the income has been set apart for the object which fails or not. The expression of a general charitable intention need not be in any particular form of words and in this connection it should be borne in mind that in the cases about to be cited from the writings of Mahomedan Jurists, the words 'wakf,' and 'sadaqah' in their different grammatical forms are used merely because these phrases are in common vogue as denoting ideas of perpetuity and a general intention to give to charity. In its literal significance the word 'wakf' means 'detention' or 'tying up', and the word 'sadaqah,' which is generally translated by English writers on Mahomedan law as 'charity' or a 'charitable purpose,' when used by the Mahomedan Jurists in the sense of the Mahomedan Canon Law, comprehends any act which is capable of conferring spiritual benefit on its doer if it is done in the hope of acquiring such spiritual benefit. In Fit hul Quadir, a well known commentary on Hedayah and a work of great authority on all questions of Hanafi Law, it is laid down "If a man makes a wakf for Zaid and the poor, and Zaid does not accept the gift, the wakf will be for the benefit of the poor; and similarly if it is for Zaid and Omar and Omar refuses the gift or it appears that he was dead, his share will go to the poor" and later on " if the donor says ' for the needy among my children' and he has but

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one needy child, that half the income will go to the child, and the other half to the poor." (*See* Vol. V, pp. 451, 452 Egyptian Edition). Qadhi Khan, a jurist of the highest authority, says in his Fatawa : " If a man says, ' this house of mine is wakf by way of sadaqah or sadaqah by way of wakf' and no more, this is valid according to Abu Yusuf, Mahomad, Hilal-ul-munaaz, (may God's blessings be on them), and it will be a wakf for the benefit of the poor" and further on " if he says ' this land of mine is sadaqah by way of wakf for *A*' it will be valid and the gift must be construed as if the donor had said ' this is sadaqah by way of wakf for the poor', because the primary object of sadaqah is the poor but the produce will be for *A* so long as he lives; and similarly if he says ' this is sadaqah by way of wakf for *B* in perpetuity' or says ' for my children in perpetuity' the answer in that case also is the same''. (*See* Qadhi Khan, Vol. III, Bulaq Edition, printed in the margin of Fatawa-Hindia on Alamgiri). In Bahrur Raiq, a book of accepted authority among Hanafis, it is stated : " And if he says ' this land of mine is sadaqah by way of wakf upon Abdulla' and Abdulla does not accept the gift the wakf is valid and the produce will go to the poor". Then later on it is laid down : " And if he (*i. e.*, the donor) says it (*i.e.*, the wakf) is for Zaid and Omar as long as they shall live and after them for the poor and Zaid accepts the gift but Omar does not, then Zaid will have half the produce and the other half will go to the poor " (*See* Bahrur Raiq, Vol. V, p. 215 printed at the press). In Al-Isaaf, among the cases cited on this point are the following: " And if he (the donor) says ' it (*i.e.*, wakf) is for my sons ' and he has two sons or more the whole of the produce will be for them— and if he has only one son that son will be entitled to half the produce and the other half will be for the poor" and " if he says ' it is for my sons ' and he has daughters only or says 'it is for my daughters' and he has sons only, the produce will go to the poor and they (*i.e.*, the sons in one case, and the daughters in the other) will get nothing " and if he says ' I have made this my land wakf for my child and the residue for the poor ' and the child dies, Abul Kasim (a well known Hanafi Jurist) says " the produce will be spent on the poor......." " and if a man makes wakf for his children and descendants in perpetuity as long as

the generations last, then after them for the poor and he has no child, the produce will go to the poor and if a child be born to him the produce will be given to the child and descendants and on their termination to the poor." (*See* Al Isaaq; Egyptian Edition; pp. 96, 97 and 99). It would be easy to multiply cases from the original authorities in support of the principle which, in our opinion, governs this case, but we think it will be sufficient to quote one more passage, and that from BAILLIE'S *Digest of Hanafi Law* which, as is well known, is a compilation from *Fatawa Alamgiri.* It is laid down (see page 609, 2nd Edition): " If a person should make his land a sadaqah appropriated—Mr. BAILLIE, it should be remembered, translates the word wakf as appropriation—for Abdulla and Zeyd, the produce is for both. When both die the whole is for the poor ; and when one of them dies his half is for the poor. In like manner when a class of persons (Kowm) is named, the produce is to be divided according to the number of heads ; and if one of them dies, his share goes to the poor and the remainder to the survivors."

In the above cases the failure of the particular gift which then lapsed into the residue for the benefit of the poor or of the other objects mentioned in the deed was due either to the death of the individual for whom the benefit was intended or his refusal to accept the gift or to non-existence of the designated class. But it can make no difference in principle to what the failure is due, and the result must be the same where the gift to one of the objects mentioned in the deed fails by reason of its not being a proper object of such disposition of property. In the present case the benefaction intended for the heirs of the donors would fail because, according to Mahomedan law as applicable to British India, such a provision does not properly fall within the scope of wakf although the Mahomedan Jurists might have thought otherwise. We must, therefore, hold that the wakf is valid and the income of the property is to be devoted for the benefit of the objects mentioned in Ex. I other than 'the heirs' of the donors. We may also observe that as the gift under Ex. I should, in our opinion, be upheld as a valid wakf, the provision for accumulation which would thus enure solely for the benefit of

charitable purposes, cannot be said to offend against the law prohibiting perpetuities.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

Ummanga and another .. Appellants.* (*Defendants Nos.* 4 *and* 5)

v.

Appadorai Pattar and others .. Respondents (*Plaintiff and Defendants Nos.* 1, 2, 7, 12, 13 *and* 14).

Ummanga v. Appadorai.

Malabar Law —Deed of sale in favour of a woman and her son —Construction—Joint tenancy not recognized—Co-parcenary—Interest taken by each—Attachment of property in execution of decree against one after death of the other.

Co-parcenary exists among the members of a Malabar tarwad; and the rule of joint tenancy is not applicable to acquisitions by people governed by the Marumakkathayam law.

Where two members of a tarwad, acquire property in their name for the tarwad, on the death of one, all the other members of the tarwad, and not the survivor exclusively, take it. But where a property is purchased in the name of a woman, governed by the Marumakkathayam law and her son, for the benefit of the tavazhi, it would depend upon the constitution of the tavazhi whether the son has any alienable interest in it or not. If the tavazhi forms a distinct branch from the main tarwad with separate properties and its own karnavan as the manager of its property and the guardian of the minor members, the incidents of tarwad property apply to it and them, the son has no alienable interest in the property and the property could not be sold in execution of a decree against him. But if the woman and her descendants or her tavazhi have not separated themselves from the main tarwad, the fact of acquisition of separate property will not make them any the less members of the original tarwad and constitute them a separate tarwad with its incidents of impartibility, etc., and the property separately acquired will be the private property of the woman's descendants and the interest of her son will be liable to be sold as in the case of an ordinary Hindu family. But if any member dies without his interest being alienated during his life-time the interest lapses to the other members of the tavazhi and it cannot be sold.

Second appeal from the decree of the District Court of North Malabar in A.S. No. 569 of 1904, presented against the decree of the Court of the District Munsif of Taliparamba in O. S. No. 92 of 1904.

The facts of the case appear sufficiently in the Judgment.

M. A. Tirunarayanachariar and *V. Ryru Nambiar* for appellants.

T. R. Ramachandra Aiyar for respondents.

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* S. A. No. 784 OF 1905. 2nd March, 1910.

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The Court delivered the following

JUDGMENT :—The plaintiff seeks to sell certain lands in execution of a decree he has obtained against the 1st defendant as the property of his judgment-debtor ; the defendants contend that the 1st defendant has no interest therein liable to be attached and sold.

From Exhibit I, it appears that the property was originally purchased in the name of Nambi, the late Karnavan of the 1st defendant's Tarwad as benamidar with the money paid to him by Parvathi, the mother of the 1st defendent. The Karnavan with the junior members assigned their interest to Parvathi and her son the 1st defendant (Exhibit I) Parvathi is dead—and the question for decision is as to the interest of the 1st defendant in the property.

It is contended by the defendants that the property belongs to the Tavazhi of the deceased Parvathi, as having been purchased for them (Exhibit I) and also on the ground that the members of the Tavazhi have been in adverse possession for more than 12 years before the institution of the suit. The plaintiff's case is that Parvathi and her sons were joint tenants and on Parvathi's death the 1st defendant became sole owner.

The Judge held that the 1st defendant's interest, which must be presumed to be one half, is liable to be attached and sold. Both the parties take objection to his finding.

The Judge has assumed that according to the defendants, Parvathi's husband made her a gift of Rs. 400, the purchase money. This appears to be incorrect. He also assumed that the defendants' contention was that the property was purchased also for the benefit of the other children of Parvathi whereas the defendants' contention always has been that it has been purchased for Parvathi's Tavazhi, *i.e.*, Parvathi's children and their descendants in the female line. This would make a material difference. If it was purchased for all the children of Parvathi who were then alive, there is no reason why their names also should not have been mentioned in Exhibit I, whereas if the assignment was executed in favour of the Tavazhi, then the execution in favour of the senior female and senior male is accounted for. There is no finding by the Judge whether the members of the Tavazhi have been in possession or only the 1st defendant and his mother.

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Further the Judge has not, in coming to his conclusion, kept in view the rules of law applicable to such cases.

We proceed to state them so far as they are necessary to the decision of this case.

In *Vydinada* v. *Nagammal* [1] a Hindu testator devised some properties to his nephew and that nephew's wife. They were held to be joint-tenants and not tenants in common and it was also held that the nephew could not sever the joint-tenancy by an alienation by him alone to a creditor. Commenting on this case their Lordships of the Privy Council observe in *Jogeswar Narain Deo* v. *Ramchandra Dutt* [2]: "There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will, an extremely technical rule of English conveyancing. *The principle of joint-tenancy appears to be unknown to Hindu Law, except in the case of co-parcenary between the members of an undivided family.* In the second place, the learned Judges misapprehended the law of England, because it is clear according to that law that a conveyance or an agreement to convey his or her personal interest by one of the joint-tenants operates as a severance."

Thus the questions for decision, whether Chandu has an alienable interest and whether he took by survivorship his mother Parvathi's interest in the property, have to be decided according to the Marmakkatayam law, not according to the principle of joint-tenancy as known to English law.

Co-parcenary exists among the members of an undivided Malabar Tarwad. If therefore the Tarwad to which Parvathi and the 1st defendant belonged had acquired the property under Exhibit I, then, all the other members of the Tarwad, and not the 1st defendant exclusively, would have taken by survivorship the interest of the deceased Parvathi. But all the parties to this suit are agreed that the property was not purchased for the Tarwad.

The property, according to the defendants' witnesses, was purchased with the sum of Rs. 400 given to Parvathi by her father, and the recitals in Exhibit I apparently show that the amount

1. (1888) I.L.R. 11 M. 258. 2. (1896) I.L.R. 23 C. 670 a p. 679.

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was advanced by her alone. If the property for that or any other reason belonged exclusively to Parvathi, and the name of the 1st defendant was inserted in Exhibit I to enable him to represent the estate before public officials, then, on her death, the property lapses according to the decisions (it is now too late to depart from those decisions) not to the Tavazhi, *i. e.*, her descendants, but to the Tarwad who take it as her heir subject to the liability of discharging her debts.—*Rayarappan Nambiar* v. *Kelu Kurup*[1]. But as the debt for which the property is now attached is not alleged to have been contracted by her, and the 1st defendant would in that case have no alienable interest therein, it cannot be attached to discharge his debt and the plaintiff's suit will, in that event, have to be dismissed.

If, as contended by the appellants before us, the property was purchased for the benefit of the Tavazhi, *i.e.*, Parvathi, her children and their descendants in the female line, then it would depend upon the constitution of the Tavazhi whether the 1st defendant has any alienable interest or not. If the Tavazhi forms a distinct branch from the main Tarwad with separate properties, and its own Karnavan as the manager of its property and the guardian of the minor members, then, in a Court of law, it forms a Tarwad though popularly called a Tavazhi and th incidents of Tarwad property will apply to it and the plaintiff's suit must fail as the 1st defendant has no interest to be attached and sold. (See *Korappan Nayer* v. *Chenen Nayar.*[2] and *Kenath Puthen Vittil Thavashi* v. *Narayanan.*[3] But if Parvathi and her descendants, or her Tavazhi, have not separated themselves from the main Tarwad either by taking their share of the Tarwad property or by renouncing their interest therein, then the minor members of this Tavazhi or branch would still continue under the guardianship of the Karnavan of the main Tarwad, Nambi, executant No. 1 in Exhibit I or whoever has succeeded him, whose liability to maintain them out of the Tarwad property would remain unaffected, though the branch may have private property. They would continue to be the members of the main Tarwad of which the executants of Exhibit I are members. The fact that Parvathi

1. (1882) I.L.R. 4 M. 150. 2. (1871) 6 M.H.C. 411.

3. (1905) I.L.R. 28 M. 182 at pp. 189, 190.

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and her descendants forming a Tavazhi have acquired property by purchase or gift will not by itself deprive Nambi, the Karnavan of the Tarwad, of his rights or discharge him of his obligations towards them; and they will not for that reason alone constitute themselves into a Tarwad with its incidents of impartibility and uncontrolled management by Karnavan. It is Tarwad property alone that is impartible. This property which a Tavazhi or members thereof may acquire will be their separate property without the incident of impartibility. The members will be equally entitled to it. The senior male or any other manager will not obviously have the right of uncontrolled management which a Karnavan has over Tarwad property. The interest of the 1st defendant as in the case of an ordinary Hindu family will therefore be liable to sold.

But if any member dies without his interest in the Tavazhi property being alienated during his life-time, then according to the Full Bench decision in *Kunhacha Umma* v. *Kutti Mammi Haji* [1] his interest lapses to the other members of the Tavazhi and it cannot be sold. This decision as well as that in *Vydinada* v. *Nagammal*, [2] above referred to, was based upon a rule of construction laid down in *Mahommed Shamsool* v. *Shewukram*.[3]

As in both the Hindu as well as the Marumakkatayam law joint-tenancy appears to be unknown except in the case of the undivided members of the family, whether this decision is consistent with the later decision of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt*, [4] it is unnecessary now to consider as the 1st defendant and not the deceased Parvathi is the plaintiff's debtor; and the question whether the interest of a member of a Tavazhi can be attached and sold before his death was not in that case raised or decided.

But if the property was acquired, as the plaintiff contends, solely for the benefit of the deceased Parvathi and the 1st defendant, then the interest of the 1st defendant therein is clearly liable to be sold. But as the deceased Parvathi and the 1st defendant alone never formed a branch or could form one to the exclusion of Parvathi's children, there can be no survivorship to the 1st defendant alone. They must be treated as tenants in

1. (1892) I. L. R. 16 M. p. 201.
2. (1888) I. L. R. 11 M. p. 258.
3. (1875) L. R. 2 I. A. 7.
4. (1896) I.L.R. 23 C. 670.

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common. The heir of Parvathi would take her interest. The preponderance of authority is in favour of the Tarwad (which includes the Tavazhi) being the heir, though there are also decisions that the Tavazhi is the heir. But in either view, as the 1st defendant does not take it exclusively, the plaintiff cannot proceed against Parvathi's interest unless the rule of joint tenancy according to English Law is applicable, and the case in *Jogeswar Narayan Deo* v. *Ram Chandra Dutt*[1] is an authority that it ought not to be so applied.

We shall ask the Judge to submit a revised finding on the following issues with reference to the above observations:

1. Whether the property belongs exclusively to the 1st defendant.

2. Whether he has any interest liable to be attached and sold, and if so, what is that interest?

Fresh evidence may be received. Findings should be submitted in six weeks, and seven days will be allowed for filing objections.

[In compliance with the above order the District Judge submitted the following

FINDING:—That the property did not belong exclusively to 1st defendant and that he had no interest liable to be attached and sold.—ED.]

This second appeal and the memo. of objections coming on for hearing* after the return of the above finding: upon perusing the affidavit filed by the 1st respondent to the effect that in consequence of the case not having been put down for Judgment in the cause list of 3rd March 1908 given to his vakil, he had no information about the order calling for a finding and that consequently the finding happened to be recorded and returned by the District Judge in his absence, the Court made the following

ORDER.—On payment by the 1st respondent to the appellants of the costs of the hearing in the District Court and of the application to this Court the case will go back to the District Court for fresh findings.

1. (1896) I.L.R.23 C. 670.

* 30th March 1909.

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The findings should be submitted in six weeks from the re-opening of the District Court after recess, and seven days will be allowed for filing objections.

In compliance with this order, the District Judge submitted the following

FINDING :—"Certain findings were called for by the High Court on 3-3-1908 and submitted by this Court on 21-4-08. On plaintiff-appellant's affidavit to the effect that in consequence of the case not having been put down for judgment in the cause list of 3-3-1908 he had no information about the order calling for a finding and that consequently the finding happened to be recorded and returned by the District Judge in his absence, the case has been remanded for fresh findings after taking additional evidence. Plaintiff-appellant has again failed to instruct his vakil to adduce fresh evidence, and respondents do not wish to examine any further witnesses.

In my original finding I remarked (para 2) that plaintiff's vakil has no instructions, but I did not mean by that that the case was not argued by plaintiff's vakil, but merely that plaintiff had not asked him to adduce fresh evidence. The case was fully argued and I submitted my finding. There is still no further evidence before me, nor any further observations by the High Court to guide me to a different decision, so I again find both the issues in the negative for the reasons given in my finding of 21-4-1908."

The Court delivered the following

JUDGMENT :—On the finding which we accept, the decree of the District Court is set aside, and the suit is dismissed with costs throughout.

The memorandum of objections is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Iyer.

Appandai Vathiyar and others .. Appellants* (*1 to 3 Legal representatives of 1st plaintiff and plaintiffs 6 and 7*)

v.

Bagubali Mudaliar and others .. Respondents. (*1st defendant, 4th legal representative of 1st plaintiff, and 2nd defendant*).

Appandai Vathiyar v. Bagubali Mudaliar.

Hindu Law—Inheritance—Priority—Mother's sister's son and maternal uncle's son—Mother's sister's son preferential heir—Texts Satatapa—Interpretation.

The mother's sister's son of a deceased Hindu is entitled to succeed to his estate in preference to his maternal uncle's son.

Obiter:—Whatever might have been the reason for naming only certain of the bandhus in the text of Satatapa, there can be no implication that they have all priority over others un-named in the text. But the persons named in the text take in the order in which they are mentioned; and the introduction of the maternal uncle and the sister's son in the list of bandhus so as to effect a breach in the order of ersons named is no reason for repudiating the notion of the order amongst the persons named *inter se.*

Second appeal from the decree of the District Court of Tanjore in A. S. No. 200 of 1906 presented against the decree of the Court of the District Munsif, Tanjore in O. S. No. 277 of 1904.

The Advocate General (*P. S. Sivaswami Aiyar*) for appellant.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The only question for consideration in this case is whether the mother's sister's son or the maternal uncle's son is the preferential heir to the estate of a deceased Hindu. The matter is involved in considerable obscurity and no clear pronouncement can be gathered from the texts of the Hindu Law. The commentators are also mostly silent upon the subject. The well-known text, cited as that of Vriddha Satatapa or sometimes that of Baudhayana, divides bandhus into three classes, namely Atmabandhus, Pitribandhus and Matribandhus. The Mitakshara is explicit that these three classes succeed in the

*S. A. 1060 of 07. 25th January 1910.

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order in which they are named; see Mitakshara, Ch. II, S. 6, Pl. 2. And the Privy Council accepting the decision of this Court in *Muthuswami* v. *Muthukumaraswami*[1] has approved of this order in *Muthusami Mudaliar* v. *Simambedu Muthukumarasawmi Mudaliar*[2]. The question of the order of succession of the three classes of bandhus being thus settled, the further question arises as to the order of succession *inter se* of the bandhus comprised in each class. The maternal uncle's son and the mother's sister's son are both expressly named in the class Atmabandhus. But there is no indication in the Mitakshara, unless the order in which they are placed is such an indication, as to their respective priority. Mr. MAYNE observes in S. 579: "Perhaps the order of enumeration is not intended to convey any right of precedence." The Smirithi Chandrika, which is the next best authority after the Mitakshara in Southern India, before giving the list of nine bandhus quoting the same text of Vriddha Satatapa, says in Ch. XI, S. 5, Pl. 13: "Cognate kindred. A description of these is given as follows in a different Smrithi *according to their order of relationship*." The learned translator in his summary at the end of the section gives the 24th place to the son of the mother's sister and the 25th to the son of the maternal uncle, thus recognising the order in which bandhus are named as indicating the order of succession. The Sarasvati Vilasa which is also a recognised authority in Southern India says in Pl. 595: "The bandhus are exhibited in another law code in the order of their greater propinquity" and proceeds to quote the same text of Vriddha Satatapa which names the maternal aunt's son before the maternal uncle's son amongst Atmabandhus. It is strange, however, that, though there is a discussion and a decision in Placita 597 and 598 as to the precedence of Atmabandhus over Pitribandhus and of the latter over Matribandhus, there is none as to the order amongst the bandhus of each class. Again in the Vyavahara Mayuka which is an authority in the Mitakshara School, though of special value only in the Presidency of Bombay, it is stated, after citing the text of Vriddha Satatapa: "Here *i. e.*, (among these) the order of succession is that stated in the text." Mr. Mandlik adds a note that this order applies to the three classes

1. (1892) I.L.R. 16 M. 23 at 30.
2. (1896) I.L.R. 19 M. 405 (P.C.)

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as well as to the several members of these classes. These are the only references that we have been able to find on the question of the order of succession among the bandhus of each class. There is, of course, the circumstance that the text of the ancient law giver, whoever he was, has named the mother's sister's son before the maternal uncle's son. There is a rule of the Mimamsa that effect should be given to the order in which persons and things are named unless the sense requires a different order; see Jayminia Nyayamala Ch. V, Adhikarana 4. In the absence of any decisive principle dictating a different order the duty of the interpreter of the law is to accept the order in which they are named as based upon some rule which they may be unable to discover or upon the mere *ipsi dixit* of the law-giver. The three commentaries that have been referred to, *viz.*, the Smrithi Chandrika, the Sarasvati Vilasa and the Vyavahara Mayuka have stated no reason for placing the mother's sister's son before the maternal uncle's son. We cannot accede to the suggestion that the exigencies of metre may have dictated the order. It may not be difficult to speculate and suggest a reason as it was attempted to be done by Mr. Ramachandra Aiyar that the mother's sister's son offers oblations to the same three maternal ancestors to whom the deceased himself offers, while the maternal uncle's son in offering oblations to his three paternal ancestors, offers only to two who are common to himself and the deceased. To this it may be answered that the offerings of the maternal uncle's son are superior because they are offered to paternal ancestors while those that are offered by the mother's sister's son are offered to maternal ancestors. It may also be on the theory of propinquity which is the guiding principle in determining the order of succession according to the Mitakshara School the mother's sister's son is to be deemed to be nearer than the mother's brother's son, for while custom sanctions the marriage of the mother's brother's daughter it has not countenanced the marriage of the mother's sister's daughter. But we cannot regard such speculation as the above as a basis for judicial decisions, for the logical application of such theories is sure to land us in difficulties from which it will be imposible to escape.

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Among the English text writers on the Hindu Law, WEST and BUHLER in Vol. I p. 134 say: "The rule as to nine specified bandhus may be expressed thus. A man's own bandhus are the sons of his own paternal aunt and of his maternal aunt and uncle. The same relatives of his father are his bandhus. The same relatives of his mother are her bandhus. *They succeed in the order* in which they have been enumerated." There can be no doubt that the order of succession referred to is in relation to the nine specified bandhus. Golap Chandra Sirkar Sastri lays down three rules as governing cases of competition between bandhus.

(1) "The nearer in degree on whichever side is to be preferred to one more remote.

(2) Of those equal in degree one related on the father's side is to be preferred to one related in the mother's side.

(3) When the side is the same the circumstance of one being related to a male and another to a female makes no difference." Applying the last of these rules to the present case it is difficult to say in whose favor the author would decide the priority—the mother's sister's son or the maternal uncle's son. Perhaps there being no inferiority in consequence of his mother's sex, the author might accept the order in which the mother's sister' s son is named as determining his precedence. Two other well-known writers on the Hindu Law, namely BATTACHARYA (at p. 460) and SARVADHICARI (at pp.700 and 761) have given precedence to the maternal uncle's son over the mother's sister's son. They have both elaborately discussed the principles determining the order of succession among bandhus. But their views have been strongly criticised by Mr. GOLAP CHANDRA SIRKAR (pp. 48-54 and 65-76). One obvious criticism of the views of these eminent writers is that they conflict with the explicit pronouncement of the Mitakshara that all Pitribandhus are postponed to the Atmabandhus. Both according to SARVADHICARI and BHATTACHARYA, the paternal grandfather's sister's son and the sister's son of even more distant paternal ancestors would come in before the Atmabandhus *ex parte materna.* It is also to be remembered that the theory of the religious of oblations has colored their judgment in a matter which falls to be determined under the Mitakshara principle of propinquity. The theory of spiritual oblation has really no place in the Mitakshara scheme of succession.

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The definition of Sapinda in the Acharakanda of the Mitakshara entirely repudiates the notion of connection by spiritual offerings. It is also expressly there stated : "Wherever the term *Sapinda* is used there, directly or mediately, connection with parts of one body is to be understood." See GOLAP CHANDRA SIRKAR SASTRI'S *Hindu Law*, pp. 58 and 59. Again in Ch. II, S. 3, V. 4, VIGNANESWARA reiterates his view as to propinquity being the sole governing principle thus : "Nor is the claim in virtue of propinquity restricted to Sapindas, but on the contrary it appears from this very text that the rule of propinquity is effectual *without any exception* in the case of Samanodhaka as well as other relatives when they appear to have a claim to the succession." In the face, therefore, of these distinct pronouncements it is difficult to decide the question under consideration on any theory of superior religious efficacy. In the very text as to the succession of cognate kindred, Ch. II, S. 6, Pl. 2, VIGNANESWARA begins by saying:" By reason of *mere affinity* the cognate kindred of the deceased are his successors in the first instance." See also MAYNE, S. 579. It is plain on a consideration of the foregoing references that the Mitakshara pays no attention to the theory of funeral oblations. See the remarks of the Privy Council in *Lallubhai Bapubhai* v. *Cassibai*[1] and of *Knox* J. in *Suba Singh* v. *Sarafraz Kunwar.*[2]

The Viramitrodaya which is an authority in the Benares School bases its rule of succession on considerations of propinquity though the capacity to confer spiritual benefit is sometimes referred to as a further ground of support. See *Suba Singh* v. *Sarafraz Kunwar*[2] and SIRCAR'S *Viramitrodaya*, pp. 186 and 194. It must, however, be admitted that the Privy Council and the Madras High Court have occasionally adverted to considerations of the religious efficacy of oblations as a factor in determining the relative priority of competing claimants to succession ; see *Byah Ram Singh* v. *Bhyah Ugur*[3]; *Muthusami* v. *Muthukumarasami*[4]; *Balusawmi Pandither* v. *Narayana Rau*[5]. Indeed Mr. Justice Muthusawmi Iyer in *Muthusawmi* v. *Muthukumarasam*[4] formulates his conclusion at p. 30 thus : "As between bandhus of the same class the spiritual benefit they

1. (1880) I.L.R. 5 B. 110 at pp. 118 and 121.
2. (1897) I.L.R. 19 A. 223 at pp. 224 and 226.
3. (1870) 13 M.I.A. 373 at p. 392.
4. (1892) I.L.R. 16 M. 23 at p. 30.
5. (1897) I.L.R. 20. M. 342 at p. 348.

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confer upon propositus is as stated in Viramitrodaya a ground of preference." As pointed out by us, however, the Viramitrodaya says at p. 194: "Greatness of propinquity is alone the criterion of succession." Whatever may be the true position of the Viramitrodaya, it cannot outweigh, so far as the Southern Presidency is concerned, the distinct pronouncement of the Mitakshara itself as to propinquity being the sole test of succession and the express statement of the order contained in the Smriti-Chandrika and the Sarasvati Vilasa. Our attention was drawn to the observations in *Balusami Pandither* v. *Narayana Rau*[1] regarding the propriety of introducing considerations of religious benefit in some cases. Assuming they are well founded they are open to the same remarks that we have made as regards Mr. Justice *Muthusawmi Aiyar's* dictum in *Muthusami* v. *Muthukumaraswami*[2]. *Tirumala Chariar* v. *Andalammal*[3] was also relied on for the view "that all other considerations being equal the claimant between whom and his stem there intervenes only one female link may legitimately be preferred to the claimant who is separated from the stem by two such links". This observation may no doubt apply to the present case. But the important qualification of "all other considerations being equal" excludes the operation of the rule, for the express authority of the Smriti Chandrika, the Sarasvati Vilasa, and the Vyavahara-mayuka must be given effect to.

The question has sometimes been discussed as to the place of bandhus not named in the list of Satatapa. It has been argued that they should all come only after the enumerated bandhus. But this view has been rightly negatived in *Gunesh Chunder Roi* v. *Nilkomal Roy*[4] in the case of the sister's son as against the mother's sister's son and in *Mohan Das* v. *Kishnabhai*[5] in the case of the maternal uncle as against the mother's sister's son. It is obvious that the decision in these cases was in favour of the person of greater propinquity. Whatever might have been the reason for naming only certain of the bandhus, there can be no implication that they have all priority over others unnamed in the text. But the introduction of the maternal uncle and the sister's son in the list of bandhus so as to

1. (1897) I.L.R. 20 M. 342. 2. (1892) 16 M. 23 at p. 30.
3. (1907) I.L.R. 30 M. 406. 4. (1874) 22 W.R. 264.
5. (1881) I.L.R. 5 B. 597.

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effect a breach in the order of persons named is no reason for repudiating the notion of the order amongst the persons *inter se* who have been named.

We are, therefore, inclined to hold that the mother's sister's son should be preferred to the maternal uncle's son. In rejecting the notion of superiority by reason of the religious efficacy of oblations we have felt ourselves more at liberty in this case in consequence of the fact that the parties to the suit are Jains and that though the Hindu Law is *prima facie* held applicable to them, its religious developments should not have unrestricted operation; see MAYNE S. 516.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Audirazu Veerayya .. Appellant (*Plaintiff*)*

v.

Audirazu Sangayya .. Respondents (*1st Defendant.*)

Audirazu Veerayya v. Audirazu Sangayya.

Madras Act III, of 1895—*S.* 3—*Office of karnam—Cognizability—Civil Courts—Madras Act IV of* 1864—*Madras Act IV of* 1893, *applicability—Inam villages.*

Madras Act IV of 1864 and Madras Act IV of 1893 have no application to inam villages which were not for purposes of village administration grouped with ryotwari villages.

The office of kurnam in an inam village to which the Madras Hereditary Proprietary Village Service Act has not been extended does not fall within Cls. 1 and 2 of S. 3 of Act, III of 1895, but falls within Cl. 3 of that section; and a suit for the recovery of that office and the emoluments attached thereto is excluded from the cognizance of a Civil Court. The words "other hereditary village offices" in Cl. 3 of S. 3 of Act, III of 1895, mean offices other than those in localities dealt with by Cl. 1 and 2 of S. 3, and not offices of a description different from those mentioned in Cl. 1 and 2.

Second appeal from the decree of the District Court of Kistna at Masulipatam in A. S. No. 438 of 1905 presented against the decree of the Court of the District Munsif of Bezwada in O. S. No. 186 of 1904.

P. Nagabhushnam for appellant.

T. Prakasam for respondents.

The Court delivered the following

JUDGMENT:—The suit is for the recovery of the Karnam's office in an Inam village in the Kristna District and of certain emoluments attached to that office. The Munsif decreed the claim to the office. The District Judge on appeal has dismissed the suit, holding that the Civil Courts have no jurisdiction. It is to be regretted that he has not pointed out the particular provision of the law under which the jurisdiction is ousted. But we think he has arrived at the right conclusion. We have had the

* S A. 615 of 1906. 14th March 1910.

Audirazu Veerayya v Audirazu Sangayya.

case twice argued before us. On the first occasion it appeared to us that the case fell within Cl. (1) of S. 3 of Act III of 1895. But on a closer examination we are satisfied that that clause does not apply. Madras Act IV of 1864 had no application to Inam villages which were not for purposes of village administration grouped with ryotwari villages. The Government notification dated the 25th of July 1878 did not therefore extend to the Agraharam we have to deal with. Madras Act IV of 1893 which applied to local areas to which Act IV of 1864 was extended did not touch the suit Agraharam. It is therefore clear that the office now in question does not fall within Cl. (1). This result is also made clear by the amendment made by Act IV of 1907 which repeals Madras Act IV of 1893 altogether and modifies the language of Cl. (1) of S. 3 of the Act III of 1895. The suit, however, is governed by the Act as it stood before the amendment; but that the meaning was the same is borne out by the history of the enactment. Although we are clear that Cl. (1) does not apply, we think Cl. (3) does. It deals with other hereditary village offices in proprietary estates. The Agraharam is a proprietary estate according to the provision in S. 4 of Act III of 1895 read with S. 4 of Act II of 1894.

We have been somewhat exercised over the word "other." Cls. (1) and (2) deal with the office of village accountant among others. Is that office excluded from the purview of Cl. (3) by the word "other"? We think not. If the office of Karnam were excluded by the word "other" there would be no meaning in excepting it from the offices in Cl. (3) by the further words "in proprietary estates wherein Reg. XXIX of 1802 remains in force the office of village accountant." We ought therefore to put a construction on the phrase "other hereditary village offices" which does not render the exception meaningless if we can possibly do so. By "other hereditary village offices" we may understand not necessarily offices of a different description but offices other than those in the localities dealt with by Cls. (1) and (2). This construction will not exclude the office of Karnam or village accountant from the "other hereditary village offices" in Cl. (3). We think this interpretation produces a result in accordance with the policy of legislature as regards the determination of the tribunal which should deal with the succession to the office of Karnams in Inam villages. We are of opinion that the conclusion of the District Judge is right and we dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Wallis and Mr. Justice Miller.

Vattakulakaran Sowdaker Abu Backer Sahib and another .. Appellants in S. A. No. 262 of 1907.* (*Claimants*).

v.

The Secretary of State for India in Council .. Respondent in all (*Defendant in all*).

Abu Backer v. The Secretary of State.

Limitation Act (XV of 1877) S. 12—Scope and effect of—Statute—Construction—Madras Acts—Forest Act V of 1882—Appeals—Applicability of S. 12 to appeals under Forest Act.

Per curiam :—S. 12 of the Limitation Act providing for deduction of time occupied in obtaining a copy of the order is not applicable to appeals under S. 10 of the Forest Act, V of 1882.

Per Chief Justice :—The effect of S. 6 of the Limitation Act in the case of a special and local enactment such as the Madras Forest Act is to exclude the application of S. 12 of the Limitation Act in the case of appeals thereunder.

S. 12 of the Limitation Act must be read with S. 4 and is one of the provisions to which S.4, which in terms applies the periods prescribed in the 2nd schedule, is subject

The extension of time provided for by S. 12 of the Limitation Act in the computation of the period of limitation for appeals does not apply to appeals under special enactments where those enactments do not require that notice of appeal should be accompanied by a copy of the order appealed against.

Per *Wallis* J :—Where the language of a section is clear and unambiguous, courts are not at liberty to speculate as to the reasons which led the Legislature to alter that language and as a result of such speculation, to put a forced and unnatural construction upon the existing section.

Second appeals from the decrees of the District Court of South Malabar in A. S. Nos. 16, 21 and 27 of 1906 presented against the orders of the Court of the Forest Settlement Officer, South Canara, &c., Districts, in claims Nos. II, I and IV of the Silent Valley proposed Reserve.

The facts appear sufficiently from the Judgments.

These second appeals coming on for hearing, in the first instance,† before Sir Ralph Benson, Officiating Chief Justice, and Mr. Justice *Krishnaswami Aiyar*, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH :—In these cases appeals were preferred under S. 10 of the Forest Act to the District Court from the decision of the Forest Settlement Officer more than 30 days after the passing of the order by

* S. A. Nos. 262, 514 and 522 of 1907. 25th November 1909.

† 4th November 1909.

Abu Backer v. The Secretary of State.

that officer. The District Judge dismissed the appeals as time-barred under the provision contained in Clause (ii) of that section. It is argued for the appellants that the time for obtaining copies of the order in each case should be deducted and if such deduction is made they are in time. The question for consideration is whether the deduction can be made. Section 12 of the Indian Limitation Act, 1877, is relied on as sanctioning the deduction. The question has been often discussed whether the general provisions of the Limitation Act are applicable to special or local laws prescribing particular periods of limitation. It has been decided in *Reference under Forest Act V of* 1882[1] that in the case of an appeal under S. 14 of the Forest Act, the time taken in obtaining a copy of the order appealed against should be deducted. This decision was doubted in the Full Bench case of *Veeramma* v. *Abbiah*[2] by Mr. Justice *Shephard* at page 112, the other learned Judges expressing no opinion on the matter. In *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*[3], however, Justice *Shephard* appears to refer to *Reference under Forest Act V of* 1882[1] without disapproval.

In the two cases of *Sambasiva Chari* v. *Ramasami Reddi*[4], and *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*[3] in which the Court was closed on the date on which the period expired, the appeals were allowed to be filed on the re-opening day on the principle that the general provisions of the Limitation Act must be deemed to apply to the periods prescribed by special or local Acts where they were not complete Codes in themselves. The decision of the Full Bench in *Veeramma* v. *Abbiah*[2] related to the application of S. 7 of the Indian Limitation Act relating to minority to a suit to compel registration under the Registration Act. It was held that the Registration Act being a complete Code in itself, the general provisions of the Limitation Act ought not to be had recourse to. The decisions, therefore, of this Court do not seem to be altogether reconcileable. So far as the present cases themselves are concerned, the applicability of S. 12 of the Limitation Act is in question. There is nothing in the language of that section which restricts its applicability to suits, appeals and applications specified in the first column of the Second Schedule to the Limitation Act. On the other hand the language is general, although S. 4 of the Limitation Act only states that suits, appeals and applications specified in the Schedule are subject to the provisions of Ss.

1. (1887) I.L.R. 10 M. 210.
2. (1895) I. L. R. 18 M. 99 (F.B.)
3. (1900) I. L. R. 23 M. 389.
4. (1899) I. L. R. 22 M. 179.

5 to 25; it says nothing as regards the applicability of those sections to suits, appeals or applications under special or local Acts.

There is nothing in Ss. 5 and 7 to 25 about suits, appeals and applications under special or local Acts. It may be argued, therefore, there being nothing in S. 12 of the Limitation Act to limit its application to suits specified in the Schedule to the Limitation Act, that it is applicable to appeals under S. 10 of the Forest Act. Against this may be urged the fact that the proviso to Clause (ii) of S. 10, Forest Act, enables the Governor-in-Council for just and reasonable cause to extend the period of 30 days. It is worthy of consideration, there being a special provision in the Act itself to extend the period provided, whether resort to the general section of the Limitation Act is contemplated for the purpose of extending the period in any other manner.

It was pointed out by Mr. Rosario that there is no incompatibility in the application of both the proviso and the general sections of the Limitation Act, for none of the general sections would be of service whereas in this case, an order is passed of which the party knows nothing for many days after it has been signed. It may also be that S. 14 having provided a period of 60 days and S. 10 only a shorter period of 30 days the power of extension for just and reasonable cause was inserted with a view to enable the Local Government to treat the appeal under S. 10 on the same footing as an appeal under S. 14. However this may be, the question is not one free from difficulty. We would therefore refer for determination by the Full Bench, the following question:—Whether S. 12 of the Limitation Act providing for deduction of time occupied in obtaining a copy of the order is applicable to appeals under S. 10 of the Forest Act V of 1882.

These second appeals coming on for hearing before the Full Bench on the 15th of November 1909, upon perusing the order of reference to the Full Bench, and upon hearing the arguments of

C. V. Anantakrishna Aiyar	for appellant	in	S. A. 262.
B. Govindan Nambiar	for	do.	S. A. 514.
J. L. Rosario	for	do.	S. A. 522.

The Government Pleader (*C. F. Napier*) for respondent

The Court expressed the following

OPINIONS.—*The Chief Justice* :—I am of opinion that the provision in S. 12 of the Limitation Act, 1877, that in

computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the order appealed against should be excluded, does not apply to appeals under section 10 of the Madras Forest Act 1882.

I think this opinion might reasonably be based on the short ground that S. 10 of the Forest Act which gives a right of appeal from the Forest Settlement Officer to the District Court, in the case of certain claims to a right in or over land within 30 days from the date of the order appealed against, empowers the Governor-in-Council to extend time for appeal. The application of the provision of S. 12 of the Limitation Act with reference to the exclusion of time in computing the period of limitation prescribed for an appeal, as it seems to me, necessarily operates as an extension of the prescribed period of limitation. Section 10 of the Forest Act in express terms gives the power to extend the period to the Governor-in-Council. Notwithstanding that the provision as to the exclusion of time in S. 12 of the Limitation Act works automatically whilst the power of extension given to the Governor-in-Council is a discretionary power to be exercised on just and reasonable cause being shown, I should be disposed to hold that the express power to extend the time given to the Governor-in-Council shows that the legislature intended that the general provisions of the law requring the Courts to extend the period of limitation in certain cases should have no application to appeals under S. 10 of the Act in question,

It may well be, as suggested in the Order of Reference, that S. 14 having provided a period of 60 days and S. 10 only a shorter period of 30 days, the power of extension for just and reasonable cause was inserted with a view to enable the Local Government to treat the appeal under S. 10 on the same footing as an appeal under S. 14.

Apart, however, from the special proviso in S. 10, I am of opinion that the effect of S. 6 of the Limitation Act, in the case of a special and local enactment such as the Madras Forest Act, is to exclude the application of S. 12 of the Limitation Act in the case of appeals under the Forest Act. I cannot adopt the view that the application of S. 12 of the Limitation Act does not affect or alter the prescribed period of limitation, and with all respect, I am unable to follow the reasoning of the learned Judges in *Reference under Forest Act V*

of 1882[1] where, in dealing with a case under S. 14 of the Forest Act, they draw a distinction between the words "shall affect such law" which occur in S. 6 of the Act, of 1871, and the words "shall affect or alter the period so prescribed" which were substituted in section 6 of the Act of 1877 and are reproduced in Section 29 (1) (*b*) of the Act of 1903.

In *Veeramma* v. *Abbiah*, [2] *Shephard* J. (see page 112) dissented from the decision in *Reference under Forest Act of* 1882, [1] and although it would seem that in *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*, [3] *Shephard* J. referred to that decision without disapproval, in *Kumari Akkappa Nayanim Bahadur* v. *Sithala Naidu* [4] he says in so many words that he adheres to the opinion expressed by him in *Veeramma* v. *Abbiah*[2] on the question of construction. I think *Shephard* J. was right.

As regards the contention that, as there is nothing in S. 12 of the Limitation Act to limit its application to suits specified in the schedule, the section is applicable to appeals under S. 10 of the Forest Act, I think the answer is that S. 12 must be read with S. 4, and is one of the provisions to which S. 4, which in terms applies the periods prescribed in the 2nd schedule, is subject.

Further, it seems to me that the provision in S. 12 of the Limitation Act as to excluding the time requisite for obtaining a copy of the order appealed against does not apply when the special enactment which gives the right of appeal does not require that the notice of appeal should be accompanied by a copy of the order appealed against. I do not think it follows from the Full Bench decision in *Kamaraju* v. *The Secretary of State for India* [5] that a second appeal lies from a decision of a District Court passed under S. 10 of the Forest Act, that the provisions of S. 541 of the Civil Procedure Code of 1882 apply to an appeal from the Forest Officer to the District Court.

The basis of the decisions in *Sambasiva Chari* v. *Ramasami Reddi* [6] and *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*,[3] was the general principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do so at the first subsequent opportunity.

1. (1887) I.L.R. 10 M. 210.
2. (1895) I.L.R. 18 M. 99 (F.B)
3. (1900) I.L.R. 23 M. 389.
4. (1897) I.L.R. 20 M. 476.
5. (1888) I. L. R. 11 M. 309.
6. (1899) I. L. R. 22 M. 179.

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I do not think it necessary to consider whether the view I have indicated can also be supported on the ground that the Forest Act is an enactment dealing with a special subject, and intended, so far as the provisions of the Act go, to be a complete body of law. See *Veeramma* v. *Abbiah* [1]; *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*; [2] and *Nagendro Nath Mullick* v. *Mathura Mohun Parhi*, [3].

On the true construction of S. 6 of the Limitation Act, 1877, I think the answer to the question which has been referred to us should be in the negative.

Wallis J:—I am of the same opinion. The language of S.6 of the Limitation Act appears to me to be perfectly plain and unambiguous. That being so we are not, I think, at liberty to go back to the language of the earlier Acts, to speculate as to reasons which led the legislature to alter that language, and as a result of such speculation, to put a forced and unnatural construction upon the existing section.

Miller J:—I agree. To my mind it is clear that the provisions of S. 12 of the Limitation Act of 1877 do 'affect' the periods of limitation prescribed by that Act and would, if applicable to other laws, affect the period prescribed by those laws.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Mr. Justice Miller, Mr. Justice Munro and Mr. Justice Abdur Rahim.

Khadersa Hajee Bappu .. Appellant*
(*Plaintiff*)

v.

Puthen Veettil AyissaUmmah and others.. Respondents
(*Defendants.*)

Limitation Act, Arts. 123, 120, 144—Mahomedan Law—Suit by Mahomedan sharer for share of deceased's property after 12 years—Art 123, scope of.

Khadersa Hajee Bappu v. Ayissa Ummah

A suit by a Mahomedan for a share of his wife's property in the possession of another sharer more than 12 years after his wife's death is governed by Art. 144 in the case of immoveables and by Art. 120 in the case of moveables.

Art. 123 applies only when the suit is for a share of an estate which it is the legal duty of the defendant to distribute and does not apply to the case of a Mahomedan dying intestate, as the estate in that case is at once vested in the heirs as tenants in common and there is no one charged by law with its distribution.

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* S. A. No. 121 of 1908. 2nd March 1910.

1. (1895) I.L.R. 18 M. 99.
2. (1897) I. L. R 20 M.476.
3. (1891) I. L. R. 18 C. 368.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 600 of 1907, presented against the decree of the Court of the Subordinate Judge of Cochin in O. S. No. 9 of 1906.

This second appeal coming on first for hearing* before Mr. Justice *Benson* and Mr. Justice *Krishnaswami Aiyar*, the Court made the following

ORDER OF REFERENCE TO THE FULL BENCH.— On the facts found the question arises whether the suit is barred by limitation. The District Judge has applied Article 123 of the Limitation Act. It is argued for the appellant that this article does not apply. Reliance is placed on *Sithamma* v. *Narayana*,[1] and certain observations in *Abdul Khader* v. *Aishamma*, [2]. For the respondent our attention is called to *Patcha* v. *Mohidin*[3] and *Kasim* v. *Ayishamma*[4]. These decisions are not overruled by the Full Bench though their authority appears to be doubted. It is pointed out in the Full Bench case that attention was not drawn in *Patcha* v. *Mohidin*[3] and *Kasim* v. *Ayishamma*[4] to the fact that in those cases the action was not against the representative of the estate of the deceased.

It seems to us that the authority of *Patcha* v. *Mohidin*[3] and *Kasim* v. *Ayisha*[4] has been considerably shaken by *Abdul Khader* v. *Ayshamma* [2] and the reasoning in *Sithamma* v. *Narayana*[1] is against the view taken in those cases. The Calcutta High Court in *Issur Chunder Doss* v. *Juggut Chunder Shaha*,[5] has taken the same view as the case in *Sithamma* v. *Narayana*.[1] The observations in *Keshav Jagannath* v. *Narayana Sakharam*,[6] are to the same effect. Looking at the language of the article itself, we are inclined to think that it applies only to suits against executors or administrators. We may refer to a full discussion of the question in *Kasim* v. *Ayishamma*[1] to which our attention has been drawn.

We refer the following question for the decision of the Full Bench:—

What is the article applicable to a suit by a Mahomedan for a share of his wife's property in the possession of another sharer more than 12 years after his wife's death?

J. L. Rosario for appellant.

B. Sitarama Rao for respondent.

1. (1889) I.L.R. 12 M. 487.
2. (1893) I.L.R. 16 M. 61.
3. (1892) I.L.R. 15 M. 57.
4. (1892) I.L.R. 15 M. 60.
5. (1883) I.L.R. 9 C. 79.
6. (1892) I.L.R. 14 B. 236 at p. 240.

* 8th February 1910.

Khadersa Hajee Bappu v. Ayissa Ummah.

J. L. Rosario for appellant.—Art. 123 is not applicable at all to a case like the present. In the first place, the suit was for a distributive share. The word "distributive share" occurs in S. 42 of the Indian Succession Act. It is intended to be applicable only to cases where the Succession Act applies. This is clear from the words of the third column "payable or deliverable." That implies a duty to pay or deliver, which is the case only when there is an administrator or executor charged with the duty to distribute. This is the view taken in *Sithamma* v. *Narayana*[1]; *Kalicharan Shaw* v. *Dukkee Shee*[2]; *Issuk Chander Doss* v. *Jugget Chander Shaha*[3]; *Keshar Jaganath* v. *Narayan Sakharam*[4]; *Umardaraj Ali Khan* v. *Wilayat Ali Khan*[5]; *Patcha* v. *Mohidin*[6]; *Kasim* v. *Ayishamma*[7] are the only cases that apply Art. 123. In the former there was no argument, the only question being whether Art. 127 was applicable. The latter case does not refer to *Sithamma* v. *Narayana*[1] or the words "payable or deliverable." *Amme Abdul Khader* v. *Ayishemma*[8] clearly disapproves of *Kasim* v. *Ayishamma*[7] though it does not formally overrule it.

B. Sitarama Rao for respondents.—In order that Art. 123 may be applicable, it is necessary, that the suit must be for a distributive share. The Hindu Law does not contemplate a distribution as a necessary consequence of succession. But the Indian Succession Law does. The Muhammadan Law contemplates that the funeral charges are to be paid first, then debts, then the property should be distributed amongst the sharers, and finally the residue should be distributed amongst the residuaries—BAILLIE *Muhummadan Law*, Vol. I, p. 683; Vol. II, p. 377. The theory of the Muhammadan Law is of a descent in shares: see *Amme Raham* v. *Zia Ahmed and others*[9] Analagous to the power of the District Judge under S. 239, the *Kazi* has power as conservator of property—*Hedaya*, Vol. II, p. 351; Baillie, Vol. II, p. 251. This necessity for distributive share takes out of the article cases of Hindu Law. This explains *Sithamma* v. *Narayana*[1]; *Kalicharan Shaw* v. *Dukku Behee*[2]; *Issur Chander Doss* v. *Joygal Chandra Shaha*[3]; *Keshar Jagganath* v. *Narayan Sakharan*[4]. The word "payable" or "deliverable" does not necessarily involve the existence of a person liable to distribute. It only indicates the time when the limitation begins to run. A legacy is payable one year after the death in cases where

1. (1889) I.L.R. 12 M 487.
2. (1879) I.L.R. 5 C. 692.
3. (1883) I.L.R. 9 C. 79.
4. (1890) I.L.R. 14 B. 326.
5. (1887) I.L.R. 19 A. 169.
6. (1892) I.L.R. 15 M. 57.
7. (1892) I.L.R. 15 M. 60.
8. (1893) I.L.R. 16 M. 61 (F.B.)
9. 1891 I.L.R. 13 A. 282 at 286.

the Succession Act applies. Under other systems, legacies may be payable earlier. Even supposing there must be a liability to pay, the person in possession is liable to distribute as executor *de son tort*—S. 94, Trusts Act; WILLIAMS on *Executors*, Vol. i, p.195, *et seq*. The heir in possession of the entirety of the estate represents the estate under the Mahomedan Law—*Hedaya*, Vol. ii, p. 655. For the principle of executor *de son tort* in Mahomedan Law, see *Hedaya*, Vol. ii, p. 653. An executor *de son tort* is a representative, see C. P. C., S. 2, and *Bussunteram Marwary* v. *Kamaluddin Ahmed*[1], *Puthummabi* v. *Vittil Ummachabi*[2], *Chunni Kuar* v. *Rup Singh*[3] *Davalaua* v. *Bhunaj Dhond*[4] *Webster* v. *Webster*[5].

The Court delivered the following

OPINION :—We agree with the decision in *Umardaraz Ali Khan* v. *Wilyat Ali Khan*[7], where it is held that article 123 applies only when the suit is for a share of an estate which it is the legal duty of the defendant to distribute. In the case of a Mahomedan dying intestate the estate is at once vested in the heirs as tenants in common and there is no one charged by law with its distribution, and as pointed out in *Abdul Khader* v. *Aishamma*[8] it does not appear that in *Patcha* v. *Mohidin*[9] or *Kasim* v. *Aishamma*[10] there was any contention that the defendant was not the lawful personal representative of the deceased. In *Patcha* v. *Mohidin*[9] the question whether article 123 applied was not discussed or expressly decided but in *Kasim* v. *Ayishamma*[10] the learned Judges do apply article 123 but as we think, wrongly.

We think the answer to the question referred must be that article 144 is applicable when the property is immoveable and article 120 when it is moveable property.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Ralph Sillery Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Esa Abbas Sait .. .. .. Appellant.* (*Plaintiff*)

v.

Jacob Haroon Sait and another .. Respondents (*Defendants*).

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* C. C. C. A. No. 28 OF 1908 — 5th November. 1909.

1. (1885) I.L.R 11 C. 427.
2. (1903) I.L.R. 26 M. 738.
3. (1889) I.L.R. 11 A. 57.
4. (1896) I.L.R. 20 B. 338.
5. (1804 & 1805) 10 Ves. 93=32 E. R. 788.
6. (1891) I.M.L.J. p. 727.
7. (1897) I.L.R. 19 A. 169.
8. (1893) I.L.R. 16 M. 61.
9. (1892) I.L.R. 15 M. 57.
10. (1892) I.L.R. 15 M. 60.

Esa Abbas Sait v. ,cob Haroon Sait.

Easements Act, Ss. 5, 13—Right of way—Not continuous—Severance of tenements—Effect of—Right to light and air—Obstruction—Right of suit—Essentials of—English and Indian law.—Compensation—Injunction—Mandatory—Physical comfort, English and Indian standard of.

A right of way is not a continuous easement and does not pass on the transfer or bequest of the dominant tenement to the transferee or devisee, in the absence of express words to that effect, even though the passage over which the right of way existed was used for the passing of scavengers at the time the vendor owned both the dominant and servient tenements.

The right to light and air is a right as between the owners of the dominant and servient tenements, and the owner of the servient tenement cannot justify his action in shutting out the light and air that used to pass from his tenement to the dominant tenement on the ground of possible light and air in consequence of changes made by the owner of the dominant tenement which might be a source of additonal light to the latter.

The extent of the right to light and air under the Easements Act is determined by the quantity of light and air that has been enjoyed for the prescriptive period, but every infringement of it cannot afford a cause of action for compensation. Substantial damage is necessary to afford a cause of action for compensation, or injunction, and damage in the case of light is not substantial unless the infringement is likely to injure the plaintiff by affectingthe evidence of the easement or by materially diminishing the value of the dominant heritage or unless it interferes materially with the physical comfort of the plaintiff.

The difference between the English and the Indian law on the question pointed out.

As regards the easement to the free passage of air, substantial damage is caused only if the act done interferes materially with the physical comfort of the plaintiff.

The difference between the standards of physical comfort in England and India pointed out.

The closing up or the complete obstruction of the only window in a room is a material interference with the physical comfort of the occupant of the room. The injury cannot be considered small and justifies the Court in granting relief by way of mandatory injunction. The owner of the dominant tenement is not entitled to en'arge his window, but will be entitled to a mandatory injunction directing the owner of the servient tenement to remove so much of the obstruction (*e.g.* wall) as interferes with the free passage of light and air to the extent of the prescribed user and enjoyment.

Appeal from the decree of the Madras City Civil Court, dated the 15th day of May 1908, in O. S. No. 107 of 1908.

The facts appear sufficiently in the judgment.

T. R. Ramachandra Aiyar and *P. V. Duraisawmi Mudaliar* for appellant.

C. E. Odgers and *Branson* and *Branson* for respondents.

The Court delivered the following

JUDGMENT:—The plaintiff in this case became the owner of the western house through Exhibits B and B1. The defendants on the other hand became entitled to the eastern house through Exhibits C and D. Both houses originally belonged to one Lazaro. The dispute relates to a lane three feet broad between the two houses, and certain rights claimed by the plaintiff therein. The defendants denied the existence of the lane. This plea has been negatived by the City Civil Judge, and we think his conclusion is perfectly right on the evidence. The plaintiff

claimed common ownership in the lane and this question formed the subject of issue I. In his plaint the plaintiff restricted his claim to common enjoyment. It is admitted on the plaintiff's behalf that Lazaro did not convey any interest in the lane to the plaintiff. We must, therefore, uphold the Judge's finding as regards the claim to common ownership. The plaintiff's claim to a right of passage through the lane for his scavenger cannot also be sustained. The plaintiff has not had 20 years' enjoyment of such a right of way since the severance of the tenements. For it is admitted the lane was blocked up ten years ago. A right of way is not a continuous easement (see Illustration (*b*) to S. 5 of the Indian Easements Act, V of 1882). And therefore, even assuming that it was used as a passage for scavengers at the time when Lazaro owned both the premises there would be no apparent and continuous easement within the meaning of S. 13 of the Indian Easements Act.

It remains to consider whether the rest of the plaintiff's claim is well founded. The plaintiff claims an easement of light and air through a window in the eastern wall of his house opening into the lane in question. The defendants dispute the presence of the window. That it has existed for more than 20 years is established by the evidence of the plaintiff's 1st and 2nd witnesses. And we adopt the conclusion arrived at by the City Civil Judge that the evidence on the plaintiff's side largely preponderates over the defence evidence as regards the period of its existence. The finding of the Court below as regards the dimensions of this window has not been seriously questioned. We have no reason to doubt its correctness. The plaintiff has rebuilt the room to which the window was the means of access for light and air. The new window is placed in the site of the old one, though it exceeds the old dimensions of 1½ ft. × 1 ft. It is clear that the plaintiff is not entitled in respect of that excess. But his right to light and air through the window to the extent of the old dimensions cannot be affected. The defendants have built a wall along the western edge of the lane so as to completely close up the window and debar all access of light and air from the side of the lane. Are the defendants entitled to do this? Several cases have been cited in the course of the argument on both sides. But, before referring to any of them, we may draw attention to S. 28, Clause (*c*), of the Indian Easements Act, which is decisive of the law in this Presidency. It runs as follows: "The extent of a prescriptive right to the passage of light or air to a certain

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window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used." This is not in accordance with the view taken by the House of Lords in *Colls* v. *Home and Colonial Stores, Limited.* [1] The rule there stated was that "to constitute an actionable obstruction of ancient lights, there must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind." Any diminution of light is insufficient. Even a substantial diminution of light that the premises have been accustomed to receive is not also sufficient to found a cause of action. But it must be such a diminution as to render the light remaining "insufficient according to the ordinary notions of mankind for the comfortable use and enjoyment of the house as a dwelling house." As pointed out by Lord *Macnaghten*, this was not the view taken in *Calcraft* v. *Thompson*, [2] and *Scott* v. *Pape* [3]. What Lord *Macnaghten* characterises as the extreme view taken in these cases was that the right which was acquired by the so-called statutory prescription was a right to a continuance of the whole or substantially the whole quantity of the light which had come to the window during a period of 20 years." At the time of the passing of the Indian Easements Act, this was apparentlythe prevailing view based upon the 3rd section of the Prescription Act, 2 and 3, William IV, Cap. 71, notwithstanding *Clarke* v. *Clark*, [4] and *Kelk* v. *Pearson.* [5] But whether this was so or not, there is no doubt the Indian Legislature chose to adopt the view enunciated by Lord *Chelmsford* in *Calcraft* v. *Thompson* [2]. And to remove any doubts there might be if the language of S. 3 of the English Prescription Act, 2 and 3, William IV, Cap. 71, was adopted, the Indian Legislature made its meaning clear by stating that "the extent of the right is the quantity of light or air which has been accustomed to enter that opening during the prescriptive period." Whatever difficulty there may be in applying the law in England to the circumstances of a particular case, as to which see *Jolly* v. *King*, [6] there can be none so far as S. 28 of the Indian Easements Act is concerned. The case with which we are dealing is not one of mere diminution of the light and air passing through the window, but of total obstruction. And therefore, even if the English law were applicable, it would fall within the rule that the obstruction would be

1. [1904] A. C. 179.
2. (1867) 15 W R. 387.
3. (1886) 1 Ch. D. 554.
4. (1865) L.R. 1 Ch. 16.
5. (1871) L.R. 6 Ch. 809.
6. (1907) A. C. 1.

actionable if it rendered the room unfit for comfortable enjoyment. The window is the only source of access for fresh air. It is the only passage for the light from the open sky.

It was attempted to argue that in the reconstruction of the room, door-ways have been opened on the western and southern sides, which, though not directly communicating with any open space but only into another room or verandah, would be the means of ingress for other light. It does not appear that this arrangement makes the place fit for comfortable enjoyment in respect of light and air, notwithstanding the defendants' obstruction. Indeed the fact that the plaintiff had found it necessary to enlarge the window negatives such a possibility. But we do not think that there is any warrant for the defendant justifying his action on the ground of possible light and air in consequence of changes made by the plaintiff which might be a source of additional light to the room in question. In *Dyer's Company* v. *King*[1] it was said by Vice-Chancellor *James*. "The right is a right as between the owner of the dominant tenement and the owner of every servient tenement; he has a right to as much light to and for the use of his house over his neighbour's land as he enjoyed 20 years ago; and the neighbour has no right to deprive him of the light which has so come to and for the use of the house over the neighbour's land, because the owner of the dominant tenement has * * * obtained other light." The circumstances do not justify the supposition of a release by the dominant owner by implication. Nor is the access of light and air by means of the new arrangement so material as, to use the language of *James* V. C., " to be much in excess of anything required by the dominant owner for the reasonably comfortable enjoyment of the premises as he enjoyed them." The above case is quoted with approval by Lord *Lindley* in *Colls* v. *Home and Colonial Stores, Limited*[2]. See also Gale on *Easements*, VIII Edition, page 335.

Though the extent of the right is determined under the Indian Easements Act by the quantity of light and air that has been enjoyed through the opening in question for the prescriptive period, the Act does not make every infringement of that right the basis of an action for compensation. The proviso to S. 30 of the Indian Easements Act, enacts that the disturbance of the easement should have actually caused substantial damage to the plaintiff. What amounts to substantial damage is stated in

1. (1865) L.R 9 Eq., 438, at p. 442. 2. (1904) A. C, 179, at p. 211.

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three explanations added to the section. Explanation 2 relates to the free passage of light; and explanation 3 to that of air. In the 1st case the damage is not substantial unless, firstly, it is likely to injure the plaintiff by affecting the evidence of the easement or by materially diminishing the value of the dominant heritage; or, secondly, it interferes materially with the physical comfort of the plaintiff, &c. There can be no doubt that in the present case the act done by the defendants is likely to injure the plaintiff by affecting the evidence of the easement. It is unnecessary to consider whether there is evidence to show that it will materially diminish the value of the dominant heritage. It may be said with equal confidence that the obstruction caused will materially interfere with the physical comfort of the plaintiff. It may perhaps be that by introducing substantial damage, as defined, as the pre-requiste of an action for compensation, the Indian Legislature has tried to reconcile the conflicting views propounded in England in the cases already referred to. Although the extent of the right acquired is apparently larger under the Indian Act, interference with it is not made actionable in every case, at least as regards the claim to compensation or injunction. By bringing in "material interference with the physical comfort of the plaintiff" as one of the alternative cases of substantial damage, a result is arrived at, similar to that reached in *Colls's Case*.[1] As regards the easement to the free passage of air, substantial damage is caused only if the act done interferes materially with the physical comfort of the plaintiff though it is not injurious to his health. The closing of the only aperture which could admit fresh air in this case must be regarded as a material interference with the physical comfort of the plaintiff. Our notions as regards the relative importance of the easements as to light and air must differ in a tropical country from those in England. As pointed out by Mr. Justice *Markby* in *Madhoosoodun Dey* v. *Bissonuath Dey*,[2] "In England an aperture is made chiefly for light: the sun being less bright, and the air colder there, we desire to obtain all the light we can, and only to admit just so much air as is necessary for wholesome ventilation; for which reason we always use glass in our windows. In this country the object is precisely the reverse—to get as much air as possible, and to exclude the superfluous light.". We do not attach any importance to the evidence of Mr. Pogson which cannot outweigh the circumstance that the only passage for the ingress of fresh air has been closed by the action of the defendants. We think such an obstruction

1. (1904) A.C. 179, at p. 211, 2. (1875) 15 B. L. R. 361, at p. 367.

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must materially interfere with the physical comfort of the occupants of the room. The plaintiff, therefore, is entitled to relief.

It has been argued for the respondents that compensation in money is an adequate remedy. Reliance is placed on the observations of *A. L. Smith*, L. J., in *Sheller* v. *City of London Electric Lighting Co.*, [1] and also on those of some of the learned Lords in *Colls* v. *Home and Colonial Stores, Limited.*[2] The decision in *King* v. *Jolly*, [3] confirmed by the House of Lords in *Jolly* v. *King*,[4] has also been referred to in support of the defendants' argument. We do not think that these cases lay down any hard and fast rule. The injury in the present case no doubt cannot be regarded as merely threatened or intended. The easement has been actually disturbed by the building up of the wall so as to close the aperture. But the defendants have not completed their construction so that a mandatory injunction might lead to serious damage and loss to them. The case falls under clause (*a*) of S. 35 of the Indian Easements Act; and section 54 of the Specific Relief Act, I of 1877, warrants the order we propose to make. We do not think that the injury to the plaintiff's legal rights is small, in which case damages might be the more appropriate relief. In *Higgins* v. *Betts*,[5] *Farwell*, J., held it to be a proper case for injunction notwithstanding the decision in *Colls's Case.*[2] And in *Chotalal Mohanlal* v. *Lallubhai Surchhand*,[6] *Jenkins*, C. J., granted an injunction even after hearing *Colls's Case*[2] cited. The facts of *Anath Nath Deb* v. *Galastaun*,[7] were very different. We think it will be sufficient to give the plaintiff a decree in the following terms, that the defendants be directed to remove so much of the wall already raised by them as interferes with the free passage of light and air through the plaintiff's window to the extent of the old dimensions, 1½ by 1 ft., and that the defendants be further directed not to build any wall so as to obstruct the passage of light and air through the said window to the extent of its old dimensions. The rest of the plaintiff's claim will stand dismissed. Each party will bear his costs throughout.

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1. (1895) 1 Ch. 287, p. 321 and 322,
2. (1904) A. C. 179, at p. 211.
3. (1905) I Ch. 480,
4. (1907) A. C. I,
5. (1905) 2 Ch. 210,
6. (1901) I. L. R. 29 B. 157.
7. (1908) I. L. R. 35 C. 661.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Thambi *alias* Chinnasawmi Padayachi .. Appellant*
(*Plaintiff*)

v.

Avayambal .. Respondent
(*1st Defendant*).

innaswami 'adayachi v. vayambal.

T. P. A. Ss. 105—*Lease—Essentials of—Writing not signed by lessor, if valid—Evidentiary value of writing.*

A writing evidencing a lease can be used in proof of the oral letting accompanied with delivery of possession, even though the writing does not amount to a lease, not having been signed by the transferor.

Per *Krishnaswami Aiyar* J :—Whether a written lease to be valid should necessarily be signed by the lessor ?

Second appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. No. 561 of 1907, presented against the Decree of the Court of the District Munsif of Valangiman in O. S. No. 131 of 1906.

Dr. Swaminathan for appellant.

T. Natesa Aiyar for respondents.

The Court delivered the following

JUDGMENTS :—*Benson* J.—The plaintiff sued for possession of a house alleging that the house was sold to him by one Meenakshi under Exh. *C* dated the 8th September 1897; that he leased it back to Meenakshi under Exh. *A* dated the 29th January 1903, that after Meenakshi's death, her daughter (the 1st defendant) executed a "rent deed" Exh. *B* dated the 6th September 1905, agreeing to rent the house for six months at a monthly rental of half a rupee and paid one month's rent, but subsequently failed to pay the rent and refused to give up possession.

The lower appellate Court has found that Meenakshi had no title to sell the house, that it belonged to her husband who is still alive though leading a wandering life, that the alleged sale (Exhibit *C*) was not for any purpose binding on the inheritance, but was intended as a shield against a creditor ; that Exhibit *A* was executed in order to give an appearance of reality to Exh. *C* and that the 1st defendant is not in possession under the alleged letting, Exh. *B*, but as daughter of the absent owner of the house.

* S. A. 413 of 1908. 11th March 1910.

In the second appeal it is contended for the plaintiff that the 1st defendant having executed Exhibit *B* and paid one month's rent cannot now resist the plaintiff's suit for possession, even though it has been found that the plaintiff had no title.

Exhibit *B*, not being signed by the lessor is not a valid lease, (*Turof* v. *Esuf Sahib*[1]), but as the letting is only for six months it does not require registration under S. 17 of the Registration Act, and it can be used in proof of the oral letting accompanied with delivery of possession alleged in the plaint.

It can be used also to prove the covenant in it to surrender the property to the plaintiff at the end of the letting. The plaintiff is entitled to recover possession in accordance with this covenant.

We must therefore set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the lower appellate Court.

Krishnaswami Aiyar J.—The suit is for the recovery of a house. The plaintiff alleged that he purchased it from the 1st defendant's mother and leased it back to her. He also stated in the plaint that after the mother's death, the 1st defendant obtained the house from him on rent for a period of six months agreeing to give up possession after its expiry. The District Munsif decreed the claim. On appeal the Subordinate Judge held that the sale of the 1st defendant's mother was invalid and that the lease back to her was colorable. As regards the lease to the 1st defendant subsequent to the mother's death, the Subordinate Judge was of opinion that Exhibit *B* could not create a valid tenancy: That document is called a rent deed and purports to have been executed by the 1st defendant. It sets out the sale by the mother and proceeds as follows: "I have taken on lease agreeing to pay a rent of half a rupee per mensem. As I have taken on lease at the rate of half a rupee per mensem for a period of six months, I shall pay the rent on the 6th of each month. On the expiry of the period, I shall surrender to you your tiled house."

It has been held by this Court in *Turof Sahib* v. *Esuf Sahib*[1] following the decision of the Allahabad High Court in *Nand Lal* v. *Hanuman Das*[2], that after the Transfer of Property Act a

1. (1907) I.L.R. 30 M. 322. 2. (1904) I. L. R. 26 A. 368.

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Krishnaswami Iyer J.

lease in writing could be operative only if it was signed by the transferor. This decision has been followed in *Kaki Subbanadri* v. *Muthu Rangayya*[1]. In *Nand Lal* v. *Hanuman Das*[2], Mr. Justice *Banerjea* appeares to have doubted the correctness of this view. In *Shed Karan Singh* v. *Maha Narain Singh*[3], the Full Bench of the Allahabad High Court deliberately refrained from expressing an opinion on the question. S. 107 of the Transfer of Property Act is by S. 4 of that Act to be read as supplemental to the Indian Registration Act. By S. 3 of the Registration Act "lease" is defined so as to include a Kabuliyat and an undertaking to cultivate or to occupy. The instrument in question in this case would fall within the definition of "lease" under the Registration Act. The effect of reading S. 107 as supplemental to the Indian Registration Act cannot, it is true, affect the meaning of the term "lease" in S. 107 which follows S. 105. The latter section defines it as a transfer and the transferor is called the lessor and the transferee the lessee. The problem is whether there cannot be a transfer within the meaning of S. 105 without the signature of the transferor when only the transferee signs the instrument and the transferor accepts it. It is somewhat significant that while the signature by the mortgagor and the donor is specified in Ss. 59 and 123 as the pre-requisite of a valid mortgage and gift, no mention is made of it in S. 107 relating to leases. It has been pointed out by Mr. Justice *Banerjea* that it is the common practice in the United Provinces to treat a Kabuliyat as an instrument creating a tenancy. That the same practice prevails in this Presidency is beyond question. And the practice has been largely encouraged by the definition of lease in the Registration Act. The question is one of great importance having regard to the large number of titles created under instruments settling the terms of a tenancy but signed only by the tenant. Assuming that there must be the language of transfer to create a tenancy does it necessarily follow that there should be any signature of the transferor appended to the instrument of transfer? In the case of instruments requiring registration the Registration Act pre-supposes executions for the appearance of the executant or of his representative, assign or

1. (1909) I. L. R. 32 M. 532.
2. (1904) I.L.R. 26 A. 368.
3. (1909) I. L. R. 31 A, 276.

Chinnasawmi Padayachi v. Avayambal. —— Krishnaswami Iyer J.

agent before the Registering Officer is made a condition of registration. See S. 34. Where a tenancy is attempted to be created by an unregistered instrument, can it be said that the lease is invalid if the instrument of transfer is signed only by the transferee and accepted by the transferor? Is there any thing to prevent the lease running as follows: "*A B* transfers certain property at a certain rent for a certain term to *C D*" followed by the signature of *C D* only? Having regard to the importance of the question and the doubts that I entertain with refererence to the correctness of the decision in *Turof Sahib* v. *Esuf Sahib*[1], I should have felt inclined to ask my learned brother to agree to refer to the Full Bench the question as to whether an instrument purporting to create a tenancy and signed only by the transferee constitutes a lease under the Transfer of Property Act. But I think it unnecessary to do so in this case. As the instrument Exhibit *B* is not registered, it cannot under the 2nd clause of S. 107 amount to a lease. The writing does not require to be registered under S. 17 of the Registration Act. It can, therefore, be used in evidence of an oral letting by the plaintiff accompanied with the delivery of possession. Such a letting is alleged in paragraph 4 of the plaint. It is found that rent was paid. And Exhibit *B* says: "I have taken on lease." But even apart from the oral letting the plaintiff is entitled to recover on the covenant in Exhibit *B* to surrender possession. In this view the decree of the Subordinate Judge is erroneous.

We must, therefore, set aside the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Krishnaswami Aiyar.

Rathnasabapathi Pillai and others .. Appellants* (*1st, 3rd, 7th and 8th Defendants*).

v.

G. Ramasami Aiyar .. Respondent (*Plaintiff*).

Specific Relief Act, S. 42—Declaration, suit for—Injunction no consequential relief—Plaintiff out of possession—Prayer for possession, essential—Injunction and possession—Meaning and incidents of—Shebait or trustee—Status of.

Rathnasabapathi Pillai v. Ramasami Aiyar.

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* S. A. No. 667 of 1907. 19th January, 1910.

1. (1907) I.L.R. 30 M. 322.

Rathnasabapathi Pillai v. Ramasami Aiyar.

Property in the actual possession of tenants is capable of possession by the landlord ; and one-person claiming to be landlord ousted by another cannot content himself with suing for a mere declaration but must sue for consequential relief in the nature of possession against his rival claimants, and if the rival claimants are entitled to joint possession with the plaintiff, he must sue for joint possession with them.

A plaintiff whether a temple trustee or not, cannot sue for a mere declaration when he is entitled to consequential relief.

Injunction is only a discretionary relief, not the appropriate consequential relief for a plaintiff out of possession.

Obiter :—

Possession is positive and connotes acts of dealing with the property and sometimes beneficial enjoyment, but an injunction which restrains another from interference is negative.

Possession and right of suit are vested in the shebait or trustee and not in the idol.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 518 of 1906, presented against the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 95 of 1905.

T. V. Gopalasami Mudaliar for appellants.

G. S. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The suit is by a dismissed trustee for a declaration of the invalidity of his dismissal and an injunction restraining the co-trustees and the temple committee from interference with his exercise of the rights of a trustee. The District Munsif dismissed the suit holding that the removal of the trustee was valid and that as the plaintiff was out of possession the suit for a mere declaration and injunction was not maintainable. On appeal the District Judge reversed the Munsif's decree and allowed the plaintiff's claim. He held that the plaintiff's dismissal was irregular and that he was entitled to sue for the declaration and injunction. No ground was taken before him on appeal that the Munsif's finding as to the plaintiff being out of possession was erroneous. He rests his judgment on the authority of the decision in *Kunj Bihari* v. *Keshavlal Hiralal*[1] and distinguishes the decision in *Narayana* v. *Shankunni*[2], and the remarks

1. (1904) I.L.R. 28 B. 567. 2. (1891) I.L.R. 15 M. 255.

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of *Subrahmania Aiyar* J. in *Vengan Poosari* v. *Patchamuttu.*[1] We are unable to agree with his view. No doubt the Bombay case referred to appears to support the District Judge : but in the face of the decisions of this Court we are unable to agree with him. The present case being clearly one of plaintiff having been ousted from possession it is open to him to sue for joint possession with defendants Nos. 8 and 9 who are admittedly the other trustees of the temple. It is said that the lands of the temple are in the physical possession of the tenants and that the plaintiff cannot have such possession himself. Besides the lands, there are the temple itself and moveable properties belonging to the temple. And even as regards the landlord's right to receive rents it is certainly capable of possession. It has been well pointed out in *The Zemindar of Vizianagaram* v. *Behara Suryanarayana Pantulu*[2], that the interest of the landlord which may consist in the mere receipt of the rents is capable of delivery and possession and Ss. 264 and 319 of the Code of 1882 have been framed on that supposition. It has been held under S. 9 of the Specific Relief Act, by this Court that possession by receipt of rents may be disturbed and the person dispossessed may bring a suit for possession under that section within six months of such dispossession. See *Jagannatha Charry* v. *Rama Rayer.*[3] In *Abdulkadir* v. *Mahomed*[4] and in *Narayana* v. *Shankunni,*[5] it appears that there were tenants in actual possession of the property. It was held by this Court, notwithstanding that circumstance, that a suit for possession should have been brought against the rival claimants to possession by receipt of rents. If the observations in *Subramanyan* v. *Paramaswaran*[6] are at variance with the view expressed in the above cases, we cannot accept them as correct. We must, therefore, hold that property in the actual possession of the tenants is capable of possession by the landlord (see also *Suryanarayanamurthi* v. *Tammanna,*[7]) and one person claiming to be landlord ousted by another cannot content himself with suing for a mere declaration but must sue for consequential relief in the nature of possession against his

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1. (1903) 14 M. L. J. 290.
2. (1901) I.L.R. 25 M. 587. at pp. 591, 592.
3. (1904) I.L.R. 28 M. 238
4. (1891) I.L.R. 15 M. 15.
5. (1891) I.L.R. 15 M. 256.
6. (1887) I.L.R. 11 M. 116 at p. 122.
7. (1901) I.L.R. 25 M. 504.

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rival claimants. And if the rival claimants are entitled to joint possession with the plaintiff, the plaintiff must sue for joint possession with them. It is, however, contended on the authority of the Bombay case, first, that S. 42 of the Specific Relief Act does not require the whole consequential relief to be claimed and that injunction is a sufficient relief consequent on the declaration and, secondly, that the rule requiring a plaintiff to seek for possession as consequential relief, where he asks for a mere declaration, is not applicable to trustees of temples. As regards the first position, assuming that S. 42 of the Specific Relief Act is to be understood as not requiring the whole consequential relief to be claimed, we think a plaintiff out of possession is not entitled to ask for an injunction merely against the person in possession. This question has been fully discussed in the judgment of *Subrahmania Aiyar* J. in *Vengan Poosari* v. *Patchamuttu*[1], though his actual decision in the case was not upheld on appeal on another ground. Upon a review of the English cases the learned Judge came to the conclusion that injunction is not the appropriate relief where the plaintiff is entitled to claim possession against the defendants. KERR on *Injunctions* (4th Edition) states at page 82: "The result of the cases, apart from the alteration made by the Judicature Act of 1873, was that where the plaintiff was out of possession the Court would refuse to interfere by granting an injunction unless there was fraud or collusion or unless the acts perpetrated or threatened were so injurious as to tend to the destruction of the estate." Again at page 114: "If the trespass or damage is complete and the title is a pure legal title, the Court would not in general interfere by way of mandatory injunction, there being a full remedy at law by ejectment." The passages above cited are supported by a number of English cases some of which Mr. Justice *Subrahmanya Aiyar* has referred to in his Judgment in *Vengan Poosari* v. *Patchamuttu*[1]. It is true that the language of S. 25, Sub-section 8, of the Judicature Act of 1873 is wider and allows an injunction whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise. But notwithstanding the generality of the language the principle laid down by *Kinderseley*, Vice-Chancellor, in *Lowndes* v. *Bettle*[2] and approved of by

1. (1903) 14 M.L.J. 290. 2. (1864) 33 L.J. Ch. 451 at p. 454.

the Court of Appeal in *Stanford* v. *Hurlstone*[1], has been re-affirmed *viz.*, that while defendant is in possession and the plaintiff seeks an injunction without possession, his claim will not be upheld. See *Leeds and Liverpool Navigation Co.* v. *Horsfall*[2]. An injunction is a discretionary relief under S. 52 of the Specific Relief Act and the consideration adverted to by Mr. Justice *Subrahmania Aiyar* in the case of *Vengan Poosari* v. *Patchamuttu*[3], against the grant of such relief in this country where the plaintiff is entitled to ask for possession against the defendant is entitled to full weight. If therefore the plaintiff in the present case cannot claim an injunction when he is out of possession and defendants Nos. 8 and 9 are in possession, the only other relief claimed in the plaint that remains is a mere declaration. It is thoroughly well established that the plaintiff cannot sue for a mere declaration when he is entitled to consequential relief. Speaking with all respect, it appears to us that the learned Chief Justice of Bombay has overlooked the fact that injunction is a discretionary relief and cannot be claimed by a plaintiff out of possession when he does not ask for possession against the defendant who is actually in possession.

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Passing to the next point, *viz.*, that the plaintiff is only a trustee of the temple, we are unable to appreciate the distinction. It is said that the property is vested in the idol and that an injunction restraining interference secures to the plaintiff the rights he claims in the most complete manner. In the Bombay case the plaintiff claimed the office of an Acharya but it included the management of a temple and of inams and other properties attached to it. It was not a mere performance of certain duties which might involve no possession of properties. Under those circumstances it is difficult to see that a mere restraint from interference is equivalent to the transfer of possession from the defendant to the plaintiff. The learned Chief Justice of Bombay asks: "How would practical effect be given to an award of possession of an office otherwise than by preventing interference with the rights of which it is made up." Where tangible moveable and immoveable property is also attached to the office, the question as regards the property is easily answered. There are provi-

1. L. R. 9 Ch. 116.
2. 33 Solicitor's Journal, 183.
3. (1903) 14 M.L.J. 290.

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sions in the Code for giving possession of immoveable property and the possession of such properry is a great deal more than the prevention of other people's interference. But even where it is a mere office of which possession is claimed Art. 124 of the Limitation Act explains the mode of possession which certainly is more than the mere restraint of another from interference. Possession is positive and connotes acts of dealing with the property and sometimes beneficial enjoyment while an injunction which restrains another frominterference is negative. The fact of the Idol being the owner and the plaintiff the trustee does not appear to us to affect the question. In *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*[1], the Judicial Committee of the Privy Council while recognizing that an idol may be regarded as a juridical person capable as such of holding property, observed: "Assuming the religious dedication to have been of the strictest character it still remains that the possession and management of the dedicated property belongs to the Shebait and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the Shebait and not in the idol." It follows that the circumstance of a trustee suing is no answer to the objection that possession should have been sued for and not a mere declaration. For the foregoing reasons we hold that the present suit is not maintainable and, in reversal of the decree of the District Judge, we restore the decree of the District Munsif with costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Maddali Venkatarayudu (deceased) and others	.. Appellants* (*1st defendant and his legal represen tatives.*)
v.	
Movva Sankarayya	.. Respondent (*Plaintiff.*)

Limitation Act, Art. 142 *Onus.*

Venkatarayudu v. Sankarayya.

In a case governed by Art. 142 of the Limitation Act, the onus is on plaintiff to show dispossession within 12 years before suit.

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* S. A. No. 615 of 1905. 10th February, 1910.

1. I. L. R. 23 Cal. 129.

Venkatarayudu v. Sankarayya.

Second appeal from the decree of the Subordinate Judge's Court of Kistna at Masulipatam in A. S. No 339 of 1904 presented against the decree of the Court of the District Munsif of Gudivada in O. S. No. 172 of 1903.

C. R. Tiruvenkatachari for appellant (1st defendant).

The Advocate-General (P.S. Sivaswami Aiyar) for respondent.

C. R. Tiruvenkatachari.—The question in this case is whether the article applicable to the case is 142 or 144 of the Limitation Act. 1st defendant is the appellant. The suit has been decreed as the 1st defendant has been held not to have proved adverse possession. The question is whether the plaintiff has proved the letting to the 2nd defendant in 1901 as alleged. The appellate Court has found the title in favour of the plaintiff in 1884. The first Court has negatived the letting and the appellate Court has not disagreed with it. The 2nd defendant claimed to hold under the 1st defendant. The real article applicable according to the tenor of the plaint may be Art 139. The land is a vacant site. *Gopaulchunder Chuckerbutty* v. *Nilmoney Mitter*[1] shows that unless plaintiff shows he was in possession within 12 years he will fail and that a false recital that defendant is the plaintiff's tenant cannot take away the operation of Art 142 *Mohin Chunder Mozoomder* v. *Mohesh Chunder Neoghi*[2] and *Muhammad Amanulla Khan* v. *Badan Singh* [3] shew that adverse possession is not required to be proved and that the plaintiff must prove his possession within 12 years. See *Mazar Husain* v. *Bidhari Singh.* [4]

The Advocate General.—The issue was whether the plaintiff's title was barred by adverse possession. Upon that the lower appellate Court has found against the defendant. The land is a vacant site. Possession in such a case must be presumed to be with the owner—*Framji Cursetji* v. *Gokuldas Madhowji*[5] The rule which would apply to the case of ordinary cultivable land will not apply to vacant or waste land—*Rajkumar Roy* v. *Gobind Chunder Roy*[6]; *Chockkalinga Naicken* v. *Muthusami Naicken*[7]; *Lukhi Narain Jagadel* v. *Jodu Nath Deo*[8] ; *Jogendra Nath Rai* v. *Baldeo Das Marwari*[9] ; *Mirza Shamsher* v. *Kunj Behari Lal.*[10]

The Court delivered the following

JUDGMENT :—The 3rd issue was framed on the assumption that the case was governed by Art. 144 of the Second

1. (1884) I. L. R. 10 C. 374.
2. (1888) I. L. R. 16 C. 473, 479 (P.C.)
3. (1889) I. L. R. 17 C, 137 (P. C.)
4. (1906) I. L. R. 28 A. 760.
5. (1892) I. L. R. 16 B. 338.
6. (1892) I. L. R. 19 C 660, 674 (P. C.)
7. (1897) I. L. R. 21 M. 53.
8. (1893) I. L. R. 21 C. 504 511 (P. C.)
9. (1907) 6 C. L. J. 735, 743.
10. (1907) 7 C. L. J. 414, 421.

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Schedule to the Limitation Act of 1877. The judgment of the Subordinate Judge proceeded on this view. He accordingly dealt with the case as if the *onus* was on the defendant. In this we think he was wrong. The article of the Limitation Act which applies is Art. 142 and the plaintiff must show possession and dispossession within twelve years prior to the date of the institution of the suit. See *Gopaul Chunder Chuckerbutty* v. *Nilmoney Mitter*[1], *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*[2] and *Mahammad Amanulla Khan* v. *Badan Singh*[3]. We must therefore ask for a finding by the Subordinate Judge on the evidence on record whether the plaintiff or his predecessor-in-title was in possession and was dispossessed within twelve years prior to the date of the suit. The Subordinate Judge will of course, in determining this question, take into consideration the nature of the land in dispute.

The finding should be submitted within six weeks, and seven days will be allowed for filing objections.

In compliance with the above order, the District Judge found the issue against the plaintiff.

This second appeal coming on for hearing after the return of the above finding, the Court delivered the following

JUDGMENT:—On the finding, which we accept, the suit is dismissed with costs throughout.

N THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Munro.

A.N. Ramasami Aiyer and another.. Appellants in both*
v. (*Plaintiffs in both.*)

Veerappa Chetti and others. .. Respondents in Appeal No. 187 of 04 (1, 2 and 3 also respondents in Appeal No. 188 of 1904. (1, 2 *and* 3 *Defendants in both.*) Other respondents in Appeal No. 188 of 1904 being 4, 5, 6 and 7 defendants.

C. P. C. (Act XIV of 1882), Ss. 13, 244—Res judicata—Suit against widow of deceased Hindu as his legal representative in respect of a decree debt—Maintainability—Executor de son tort, meaning of—Widow of deceased undivided co-parcener in possession of joint family property not executor de son tort—Hindu Law—Debts—Decree

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* Appeals 187 & 188 of 1904. 11th January 1910.

1. (1884) I.L.R. 10 C. 374.
2. (1888) I.L.R. 16 C. 473.
3. (1889) I.L.R. 17 C. 437.

debt of managing member—Undivided brother's liability to pay—Fresh suit not maintainable—Partnership suit—First suit for dissolution against some partners—Second suit against all—Not maintainable.

S. 244, C. P. C. (1882) is a bar to a suit against the widow of a deceased Hindu as the latter's representative for recovery of a decree debt from the separate property of the deceased in her possession.

An excutor *de son tort* is a person who intermeddles with the estate of a deceased person. The widow of a deceased undivided Hindu co-parcener in possession of the joint family estate is not an executor *de son tort* in any sense in respect of the deceased's estate, as at his death his estate passes by survivorship to the other co-parceners.

An undivided brother of a Hindu is under no pious obligation to discharge the debt of his brother, and a decree passed against the manager of the family in his personal capacity, even though in respect of a debt incurred for purposes binding on the family, does not give rise to a cause of action again st the judgment-debtor's brother, the decree debt not being the original debt but a new debt altogether.

[*Periasami Mudaliar* v. *Seetharama Chettiar*[1] referred to.]

Cause of action does not depend upon the relief claimed and a prior suit for dissolution and winding up of partnership is a bar to a second suit against the same persons based upon the same allegations, especially in the absence of any allegation that there were any fresh transactions or any accounts to be gone into other than those which had been gone into in the prior suit.

All partners should be made parties to a suit for the winding up of partnership; and if a suit is not maintainable against some of the partners by reason of a previous suit having been instituted for the same relief [*e.g.*,] by reason of the bar created by S. 13 C.P.C. of 1882] the same is not maintainable even as against thers alleged to be partners though not impleaded in the prior suit.

Appeals from the decrees and judgments of the District Court of South Arcot in O. S. Nos. 13 and 14 of 1903 respectively.

Plaintiff and one Subbaraya along with certain others carried on a partnership. Plaintiff brought O.S. No. 8 of 1900 for a dissolution of partnership and for accounts against Subbaraya and other partners. The matter was referred to arbitration and the suit ended in a decree against Subbaraya for a specific amount. Pending execution, Subbaraya died. The plaintiff sought to proceed against Subbaraya's brother and brother's son and Subbaraya's widow as the legal representatives of; Subbaraya but the High Court held that Subbaraya was not sued in a representative capacity, that the brother and brother's son of Subbaraya were not his legal representatives and could not be proceeded against in execution of the decree against Subbaraya, but ordered execution of the decree against the separate assets, if any, of Subbaraya in the hands of his widow, the 3rd defendant, in these present cases.

1. (1903) I.L.R. 27 M. 243.

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Subsequently the plaintiff brought these two suits, the first for a declaration that the decree obtained by him against Subbaraya who was the undivided brother of defendant No. 1 was binding on the 1st defendant on the ground that the said Subbaraya carried on the partnership as representative of the family consisting of himself and the 1st defendant and further represented the family in the prior suit, and for the recovery of the decree amount from the joint family assets in the hands of the 1st defendant and his son, the 2nd defendant, and Subbaraya's widow, the 3rd defendant. The plaintiff also filed an alternative suit for winding up the partnership on the basis that defendants 1 and 2 were also partners being the undivided co-parceners of Subbaraya, the defendant in the original suit, in case the original decree against Subbaraya be found not binding on defendants 1 and 2. The other partners who were plaintiffs in the original suit against Subbaraya were also impleaded in the 2nd suit.

The District Judge dismissed the suits on the preliminary ground that the suits were not sustainable against defendants 1 and 2 by reason of Ss. 13 and 43, C.P.C. (1882) and against the 3rd defendant by reason of S. 244, C. P. C. (1882). Hence these appeals.

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for appellants.

S. Srinivasa Aiyangar, *S. Srinivasa Aiyar* and *G. S. Ramachandra Aiyar* for respondents.

P. R. Sundara Aiyar.—The debt is binding on the family. I am entitled to establish it, though I cannot execute the previous decree. If this is not so, I am entitled to sue for dissolution and profits unless there be some rule of law preventing me from suing again after suing Subbaraya for dissolution and winding up.

A. S. 187 of 1904.—This suit proceeds on the footing that there was in fact a family trade. It makes no difference whether the member is a father or a brother. The difference is only in the degree of obligation. *Nanomi Babuasin* v. *Madan Mohan* [1] is a case of a decree against the father. The case of a brother is *Daulat Ram* v. *Mehr*[2]. This shows that it does not matter whether the debt is a mortgage debt or a simple debt, if the interest of all was sold

1. (1885) I.L.R. 13 C. 21 (P.C.) 2. (1887) I.L.R. 15 C. 79 (P.C.)

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in fact—*Muhammad Askari* v. *Radha Ram Singh*[1]; *Umamaheshwara* v. *Singaperumal.* [2] It does not matter that the father is not sued in his representative capacity nor does it matter that the son is not a party if the debt for which attachment is made or the mortgage given is one which will bind other members. S. 244 does not affect; for the question is not one relating to discharge, satisfaction or execution of the decree. The nature of the debt is to be looked into—*Ramanadhan* v. *Rajagopala*[3]; *Jagabhai Lalubhai* v. *Bhukandas*[4]; *Arunachala* v. *Munisami Mudali*;[5] *Sitanath Koer* v. *Land Mortgage Bank of India*[6]; *Nanakat Velamma* v. *Ibrahim Labhe*[7]; *Muttia* v. *Virammal* [8]; *Ariabudra* v. *Doraisami* [9]; *Rangayya Chetti* v. *Thanikachala Mudali* [10]; *Muttayyan Chettiar* v. *Sangili Vira Pandia.*[11] In *Sathuvayyan* v. *Muthuswami*[12] a distinction is drawn between a father being a manager and a brother being a manager. This decision, I submit, is wrong and is inconsistent with *Rangayya Chetti* v. *Thanikachala*[10]; S. 234, old C. P. C.; *Sarkimani* v. *Balakrishna*[13]; *Khmshiobai* v. *Hormasha*[14]; S. 53 of new C. P. C.; *Muhammad Askari* v. *Radhe Ram Singh*[1]; As regards the 3rd defendant the family property can be got hold of only by a suit, but in execution only the separate property of Subbaraya could be proceeded against—*Magaluri Garudiah* v. *Narayana Rungiah*[15]; *Narayanasami Pillai* v. *Esa Abbayi Saib*[16]; *Hari Vithal* v. *Jairam Vithal*[17]; *Sakharam* v. *Devji* [18]; *Kunj Behari* v. *Kandha Prosad.* [19]

S. Srinivasa Aiyangar.—Practically the other side has argued that a suit lies upon the judgment. A Hindu son's liability may be enforced in various ways but no suit will lie against a brother upon a judgment obtained against the managing brother or uncle. The only class of suits to enforce obligations against brothers after a judgment obtained against the managing

1. (1900) I.L.R. 22 A. 307.
2. (1885) I.L.R. 8 M. 376.
3. (1889) I.L.R. 12 M. 309, 310, 311.
4. (1886) I.L.R. 11 B. 37.
5. (1883) I.L.R. 7 M. 39 (F.B.)
6. (1883) I.L.R. 9 C. 888.
7. (1903) I.L.R. 27 M. 375.
8. (1887) I.L.R. 10 M. 283 (F B.)
9. (1888) I.L.R. 11 M. 413.
10. (1895) I.L.R. 19 M. 74.
11. (1882) I L.R. 6 M. 1 (P.C.)
12. (1888) I.L.R. 12 M. 325.
13. (1908) I.L.R. 35 C. 1100.
14. (1899) I.L.R. 11 B. 729.
14. (1881) I.L.R. 3 M. 359.
16. (1905) I.L.R. 28 M. 35.
17. (1890) I.L.R. 14 B. 597.
18. 1898) I.L.R. 23 B. 372.
19. (1907) 6 C.L.J. 362.

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brother or uncle is under S. 283, C. P. C. All the cases quoted are only so. *Nanomi Babuasin* v. *Modan Mohan*[1] does not lay down that a second suit can be brought against the son. *Daulat Ram v. Mehr Chand* [2] deals only with a mortgage of the whole interest, *vide* page 80. The creditor generally has a right to elect as regards the liability of the other members of the family when the original liability has been incurred by the managing member who is not the father—Mayne's *Hindu Law*, p. 464, Art. 350. Simply because the managing member carries on a trade the trade does not become that of the family and even otherwise the other members are not personally liable for the trade debts. In this case the plaint prays only for a personal decree against the other members, having once got a personal decree against the managing member and not having executed it, a second suit will not lie against others. *Sathuvayyan v. Muthusami* [3] decides the distinction between a mortgage and a personal debt incurred by the manager. If the manager is sued in his representative capacity in the case of a personal claim, the creditor may attach and sell the interests of others. The suit, as brought, is based upon the judgment-debt obtained against the managing member. No second suit lies—*Viraraghavam* v. *Samudrala*[4]; *Guruvappa* v. *Thimmia*[5]; *Jumoona Pershad Singh* v. *Dig Narain Singh*. [6] The previous suit against the deceased manager was only for a personal tortious act and it prayed only for a personal decree against him and not a representative decree. The judgment therein to that effect is *res judicata*. From the fact of the managing member being a partner in a trade with another, there is no presumption that the other members of the family are also partners in the trade—*Chalamaya* v. *Varadayya*.[7] The possession of assets makes only the heir liable but the son or brother takes the property only by survivorship and not as assets of the deceased manager. If the decree against the manager be in his representative capacity the death of the manager does not affect its executability against the other members—*Muthia* v. *Virammal*[8]; *Minakshi Achi* v. *Chinnappa Udayan*[9]; *Subbanna Bhatta* v. *Subbanna*[10];

1. (1885) I.L.R. 13 C. 21. (P.C.)
2. (1887) I.L.R. 15 C. 70 P.C.
3. (1888) I.L.R. 12 M. 325.
4. (1885) I.L.R. 8 M. 208.
5. (1887) I.L.R. 10 M. 316.
6. (1883) I.L.R 10 C. 1.
7. (1898) I.L.R. 22 M. 166.
8. (1887) I.L.R. 10 M. 283 (F.B.)
9. (1901) I.L.R. 24 M. 689, 694.
10. (1907) I.L.R. 30 M. 324.

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Suraj Bunsi Koer v. *Sheo Prasad.*[1] As to son's liability see *Periasami Mudaliar* v. *Seetharama Chettiar.*[2] *Dwarka Nath Chowdhury* v. *Bungshi Chandra Saha*[3] shows that a decree against a manager alone not sued in his representative character cannot be executed against others. The view taken in *Nalamayya* v. *Varadayya*[4] has been followed in *Ranjit Singh* v. *Amullya Prasad Ghose*[5]. Mere participation in profits of the partnership does not make one member of the family a partner—*Vadilal* v. *Shah Kushal*[6]; *Anant Ram* v. *Channulal*[7]; MAYNE'S *Hindu Law*, 7th Edition, Ss. 331-333, 350; TREVELYAN'S *Hindu Family Law*, pp. 280-281. Suits under S. 283, C. P. C., are only a continuation of the summary order under S. 278—*Bibi Phul Kumari* v. *Ghanshyam Missa*[8]. The managing member is not an agent for other members but only a trustee—*Annamalai* v. *Murugesan.*[9]

G. S. Ramachandra Aiyar, for the 3rd defendant:—S. 244 is a bar. That has been conceded so far as the assets of the deceased in her hands are concerned. If it is intended to enforce the suit against the family property in her hands, that has been taken by others by survivorship. It was not the property of the deceased. Where there is no estate of the deceased there cannot be any executor *de son tort*—*Seshyya* v. *Subbaji Aiyar*[10]; MAYNE'S *Hindu Law*, para 328, which quotes an old Sudder decision of Madras. If I am in possession of the family property that can be proceeded against in execution in a decree against the property and against the brother. I am therefore an unnecessary party. The cases quoted by the appellant do not apply.

P. R. Sundara Aiyar in reply:—The suit is not upon the old judgment and as it has been already decided that I am not to have any decree against the other members I cannot execute the decree. The cases quoted are distinguishable. [*Munro* J.—You have got only a personal decree against a person who happens to be the manager. How can you show in execution that it was for a family necessity ?] *Sakharam* v. *Devji*[11] allows it. *Nanakat*

1. (1879) I.L.R. 5 C. 148 (P. C.) 157, 173.
2. 1903 I.L.R. 27 M. 243 (F. B.)
3. (1905) 9 C.W.N. 879.
4. (1898) I.L.R. 22 M. 166.
5. (1905) 9 C.W.N. 923.
6. (1902) I L R. 27 B. 157, 160.
7. (1903) I.L.R. 25 A. 378.
8. (1907) 17 M.L.J. 618 (P. C.)
9. (1904) I.L.R. 26 M. 544 (P. C.)
10. (1896) 6 M. L. J. 186.
11. (1898) I. L. R. 23 B. 372.

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Velama v. *Ibrahim Labha* [1] *Kunj Behari Lal* v. *Kandh Prahad Narain Singh* [2] ; see *Muttayyan Chetti v. Sangili Veera Pandia* [3] as to a second suit upon a decree debt as against the son. If no second suit is allowed after his death in the case of a decree against a manager personally, there would be an anomaly I rely upon the passage in p. 165 in *Suraj Bunsi Koer* v. *Sheo Prasad*[4] as to the position of a manager. [*Miller J.*—What do you say to the observation in *Guruvappa* v. *Thimmah*[5] ?] Probably what is meant is a second suit against the son on the original cause of action. In this case the previous decision is only that the decree alone is personal and not the debt as regards the 3rd defendant. I submit the property in her hands was the property of the deceased which he could have disposed of during his lifetime.

Though I have asked for a decree against the defendants in the present suit I contend that there are allegations in the plaint that the debt was a debt binding upon all the members so that I would be entitled to at least a decree against the family property in their hands.

A. S. 188 *of* 1904.

P. R. Sundara Aiyar and *C. V. Anantakrishna Aiyar* for the appellant.

S. Srinivasa Aiyangar and *S. Srinivasa Aiyar* and *G. S. Ramachandara Aiyar* for the respondents.

P. R. Sundara Aiyar.—Suit is for the winding up of the partnership and consequent reliefs. It does not pray for dissolution. The Vakil then dwelt on the nature of the previous suit and the present suit and the parties in both with a view to show that this suit would lie.

King v. *Hoare*[6] does not apply in India, for in India, the liability is joint and several. As against a person who was not a party to the previous suit a new suit could be on a joint and several cause or obligation. S. 43, C. P. C., bars a new suit only as against the same defendant. S. 43 of the Contract Act does not lay down a rule of procedure but only of substantive law—

1. (1904) I. L. R. 27 M. 375.
2. (1907) 6 C, L. J. 362.
3. (1882) I. L. R. 6 M. 1, 5, 6. (P. C.)
4. (1879) I. L. R. 5 C. 148, 165.
5. (1887) I. L. R. 10 M. 316.
6. (1844) 13 M. and W. 494.

Dampanaboyina Gangi v. *Addala Ramasawmi*[1]; S.A. 1746 of 1908; *Dhunput* v. *Sham Soonder*[2]; *Umamaheswara* v. *Singaperumal*[3]. Reason of *King* v. *Hoare*[4] is to avoid different judgments. On the other hand the reason against the propriety of that decision is that a creditor may not know the existence of all the debtors—Ss. 42, 43, 44 of Contract Act read; Halsbury's *Laws of England*, Vol. VII, p 459, S. 936; *Kendall* v. *Hamilton*[5]; *Gurusami Chetti* v. *Samurthi Chinna*[6] a case from the original side of this Court; *Umamaheshwara* v. *Singaperumal*[3]; *Narayana Chetti* v. *Lakshmana Chetti*[7]; S. 29, C.P.C.; *Hemandra Coomar Mullick* v. *Rajendrolal Moonshee*[8]; *Radha Pershad* v. *Ramkhelawan*[9]; *Muhammad Askari* v. *Radha Ram Singh*[10]; [*C. V. Anantakrishna Aiyar* continued.]—A suit for dissolution of partnership is different from one for winding up. In the case of joint family, if the managing member joins a partnership on behalf of the family then all the members of the family are members of the partnership—*Sokkanadha Vannimundar* v. *Sokkanada Vannimundar*[11]; POLLOCK and MULLA on *Contract Act*, 2nd Edition, p. 229, footnote; *Dampanaboyima Gangi* v. *Addala Ramasami*[1]; *Jugdeo Singh* v. *Habibulla*[12]. There is no bar by S. 244. Even if it is, the suit can be converted into an application—S. 47, new C. P. C.

S. Srinivasa Aiyangar.—If a suit against some partners is barred the suit is barred against all. If some of them cannot be joined in the suit for any reason no suit against others will lie. In the case of partners each partner is entitled to plead that others also should be joined. If the matter is governed by Ss 42, 43, 44, of the Contract Act, a joint promise must be proved. The managing member is not an agent of other members—*Muhammad Askari* v. *Radha Ram Singh*,[10]—so he could not have made a promise on behalf of others. The fact that there is no prayer for dissolution now but it is only for winding up does not show that it is not the same cause of action as sued for before. The allegations in the two are the same. How any decree obtained

1. (1902) I. L. R. 25 M. 736.
2. (1879) I. L. R. 5 C. 291.
3. (1885) I. L. R. 8 M. 376, 378
4. (1844) 13 M. and W. 494.
5. (1879) 4 A. C. 504.
6. (1881) I. L. R. 5 M. 37, 43.
7. (1897) I. L. R. 21 M. 256.
8. (1878) I.L. R. 3 C. 353, 359, 361.
9. (1895) I. L. R. 23 C. 302.
10. (1900) I.L.R. 22 A. 307.
11. (1904) I.L R. 28 M. 344.
12. (1907) 6 C.L.J. 612.

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against Subbaraya personally could be executed against others so as to make the principle of S. 47 of new C.P.C. applicable, it is difficult to see as it assumes that others also are partners through him and as he has not left any assets. There is no allegation in the present plaint that the other members were partners and that the plaintiff did not know of their existence at the time of the former suit. It is not contended that the previous judgment-debt, as such, is a debt of the family : what is contended is that the debt for which that judgment was obtained was one binding upon the family. There is no allegation in this plaint of any benefit which the family derived by that debt. This suit is also obnoxious to S. 43, C.P.C. Moreover there has been already an election. There cannot be two suits for winding up a partnership nor is there any ground disclosed why a second suit for the same purpose is brought—*Kendal* v. *Hamilton.*[1] The objection as to maintainability of the second suit is that of the man who is then newly sued. The cause of action has already merged in the previous decree. A joint liability is not prohibited in India; all that is said is that the liability is generally presumed to be joint and several *vide*; S.265 of the Contract Act. As a prayer for winding up was inserted in the previous suit and not given it must be deemed to have been refused—S. 13 Cl. (3) C.P.C. No one can be allowed to say that a previous suit which he brought was a bad one and that the present one is a good one. If the old suit could be viewed as one based upon an election made by the plaintiff when he could have sued not only one but all of a family, the decree in the old suit is good and exhausts the cause of action. A mistake of law committed by the plaintiff in suing for less while he was entitled to more bars the plaintiff from making a new suit for more—*Kavari Ammal* v. *Sastri Ramier*[2] ; *Benjamin Scarf* v. *Aldred George Jardine*[3]. In a suit for a winding up and accounts every member of the partnership must be a party—LINDLEY on *Partnership*, 7th Edn., p. 504. It is true that S. 43 will be a bar only against a person who has been already a party in the previous suit.—*D. Gangi* v. *A. Ramasami*[4]. But that does not apply where the cause of action against all is one and the same—Ss. 42 and 43, C. P. C. The cause of action

1. (1879) 4 A. C. 504.
2. (1902) I.L.R. 26 M. 104.
3. (1882) 7 A.C. 345.
4. (1902) I.L.R. 25 M. 736,739.

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for the dissolution and winding up of a partnership is one and the same for all the partners. The plaintiff could have asked in the previous suit for reliefs against the other members of the family. *Amanat Bibi* v. *Imdad Hussain*[1] applies as the plaintiff now says that he brought the previous suit against the manager only in his representative capacity.

On the question of election; no second suit will lie even if the liability be joint and several, for the cause of action is merged in the decree—*Sessions* v. *Johnson*[2]. It is not both joint and several at the same time. It is a question of waiver—BLACK on *Judgments*, 2nd Vol., S. 775. One cannot first sue one of several joint promisors and then afterwards sue him and other several promisors—*Benjamin Scarf* v. *Aldred George Jardine*[3]. The liability of the other members is not governed by the Contract Act but by Hindu Law—*Sitaramayya* v. *Venkataramanna*[4]. *King* v. *Hoare*[5] has been approved of in *Gurusami Chetti* v. *Samurthi Chinna*[6]; *Chinnappa Rowther* v. *Robert Fischer*[7]; *Umamaheswara* v. *Singaperumal*[8]; *Lakmidas Khimji* v. *Purushotam Haridos*[9]; *Narayana Chetti* v. *Lakshmana Chetti*[10]; *Lakshmisankar* v. *Vishvaram.*[11] S. 262 of the Contract Act has not been referred to in any of these cases and it supports the decision in the last case. *Dick* v. *Dhunji Jaita*[12] is distinguishable—*Hemendra Koomar Mullick* v. *Rajendrolak Mosher*[13]; *Roy Lutchmisint Singh* v. *The Land Mortgage Bank of India Ltd.*[14] a case of Mahomedan family *Nobin Chunder Roy* v. *M. Dassya*[15] *Radha Prasad Sigh* v. *Pamkhelawan*[16] The reasons adopted by the Allahabad High Court for not following *King* v. *Hoare*[5] and *Kendall* v. *Hamilton*[17] are unsound and tend to inconvenience.

C. V. Anantakrishna Aiyar in reply.—The liability is joint and several. See *Pollock* and *Mulla* on *Contract Act*, Notes under

1. (1888) 15 I.A. 106, 112 S. C. 15 I.L.R. C. 800.
2. (1877) 95 U. S. Reports 347 at 348.
3. (1882) 7 A.C. 345 at 360.
4. (1888) I.L.R. 11 M. 373.
5. (1844) 13 M. & W. 494.
6. (1881) I.L.R. 5 M. 37.
7. (1907) I.L.R. 30 M. 435,
8. (1885) I.L.R. 8 M. 378.
9. (1882) I.L.R. 6 B. 700.
10. (1897) I.L.R. 21 M, 256.
11. (1899) I.L.R. 24 B. 77
12. (1901) I.L.R. 25 B. 378.
13. (1878) I.L.R. 3 C. 353.
14. (1887) I.L. R 14 C. 469 at 475.
15. (1881) I.L.R. 10 C. 924.
16. (1895) I.L.R. 23 C. 302
17. (1879) 4 A C. 504.

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S. 43. No question of *res judicata* can arise if the plaintiff does not want any additional decree against the person who was already a party. S. 43, C.P.C., cannot be a bar against one who has not been a party previously. A managing member cannot sue or be sued on behalf of all—*Angamuthu* v. *Kulandavelu*[1]. *M. Askari* v. *R. R. Singh*[2] applies.

The Court delivered the following

JUDGMENTS :—*Munro* J.: —The 1st plaintiff in these appeals brought O.S. No. 8 of 1900 against Subbaraya Chetti, Siva Chidambara Chetti and Narayana Row for dissolution of partnership, for winding up of the partnership accounts and for the recovery from Subbaraya Chetti of a certain sum of money. It was alleged that under the partnership agreement Subbaraya Chetti was the managing partner, that a sum of money was given to him by the plaintiff and Narayana Row's father and that he refused to furnish accounts. The cause of action was stated to have arisen in September 1899 when the partnership trade was stopped. A decree was passed dissolving the partnership and directing Subbaraya Chetti to pay the 1st appellant Rs. 2,976-8-2¾ with interest. Subbaraya Chetti having died before execution, the 1st appellant sought to execute the decree under S. 234, Civil Procedure Code, against Rathina Ammal, the widow, and Veerappa Chetti, the undivided brother of Subbaraya Chetti. The District Judge passed a certain order against which there was an appeal to this Court. This Court held that the decree against Subbaraya Chetti was purely a decree *in personam* against him, and further remarked that there was nothing on the record to show that Subbaraya Chetty was sued in his representative capacity as manager of the family or that the trade in respect of which the suit was brought was one that was necessarily a family business and not Subbaraya Chetti's individual trade. With these views I entirely agree. The decree was therefore not allowed to be executed against Veerappa Chetti by attaching and bringing to sale joint family property which had come to him by survivorship, whether it was ordinary family property or property acquired for the family by the partnership trade. As regards the separate property of Subbaraya Chetti, it was held

1. (1889) I. L. R. 23 M. 190. 2. (1900) I. L. R 22 A. 309.

that execution under Section 234, C.P.C., should proceed only against his widow who was his legal representative and the name of Veerappa Chetti was struck off the record. The 1st appellant and his son, the 2nd appellant, then filed O. S. Nos. 13 and 14 of 1903 and, these suits having been dismissed, presented the present appeals.

The plaint in O. S. No. 13 which was against Veerappa Chetti, Veerappa Chetti's son and Rathina Ammal as 1st, 2nd and 3rd defendants, set out that the present 1st appellant acting as manager of his family, Subbaraya Chetti acting as manager of his family, and others entered into a partnership; that disputes having arisen, O. S. No. 8 of 1900, above referred to, was brought; that Subbaraya Chetti had carried on the partnership trade for the benefit of the joint family then consisting of himself and Veerappa Chetti and that, as the family had enjoyed the benefit of the trade, the 1st and 2nd defendants were bound to pay to the plaintiffs the amount due to them by Subbaraya Chetti; that Subbaraya Chetti represented the joint family in O. S. No. 8 of 1900; that the finding in O.S. No. 8 of 1900, that Rs. 2,976-8-2¾ was due to the plaintiffs by Subbaraya Chetti and that the latter was liable to pay that amount with interest at 12 per cent per annum from the 26th March 1900, the date of the plaint in O.S. No. 8 of 1900, was binding on the 1st and 2nd defendants, as also the order of the Court dissolving the partnership as from the 16th December 1901, the date of the decree; that the 1st and 2nd defendants were bound to pay the amount above mentioned, and that the 3rd defendant was also liable to pay that amount because she was in possession of property belonging to the joint family of a larger value than that amount; and that the cause of action arose on the 16th December 1901, the date of the decree or in July 1902, by which date is apparently meant the date of Subbaraya Chetti's death. The prayer was that the defendants do pay the plaintiffs Rs. 4,186-8-2¾, made up of Rs. 2,976-8-2¾ with interest as abovementioned.

In O.S. No. 14, in addition to the three persons impleaded as defendants in O.S. No. 13, there were four other defendants. Of these four only two, the 5th and 6th defendants, need be considered, they being the persons who as partners were made

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defendants with Subbaraya Chetti in O. S. No. 8 of 1900. The plaint in O.S. No. 14 made the same main allegations as were made in the plaint in O. S. No. 13, mentioned the institution of O. S. No. 13, and prayed that if the Court should for any reason hold in O. S. No. 13 that the 1st and 2nd defendants were not bound by the findings in O.S. No. 8 of 1900, and that the plaintiffs were not in O.S. No. 13 entitled to recover the amount due to them, the partnership might be wound up, and the accounts of the partnership taken, and that the plaintiffs might be paid the amount found due to them by such defendants as were found liable. The cause of action was stated to have arisen on the same dates as in O. S. No. 13.

Two of the issues framed in O. S. No. 13 were:—

(1) Whether or not S. 244, Civil Procedure Code, is a bar to the maintenance of the present suit either against 1st and 2nd defendants or against the 3rd defendant? and

(2) 1st and 2nd defendants not having been parties to O. S. No. 8 of 1900, does the fresh suit to make them liable to satisfy the decree in that suit lie?

On the firt of these issues the District Judge found that S. 244, Civil Procedure Code, was a bar to the suit as against the 3rd defendant. He found the second of the issues in the negative, and accordingly dismissed the suit. Both these findings are attacked in appeal No. 187.

That the suit was rightly dismissed as against the 3rd defendant is clear. So far as the separate property of Subbraya Chetty is concerned, the plaintiff's only remedy was to execute the decree in O. S. No. 8 ot 1900 against the third defendant, Subbraya Chetti's legal representative, under S. 234, C. P. C., section 244, C. P. C., being a bar to a suit against the 3rd defendant in respect of such separate property. With regard to the joint family properties of which the 3rd defendant is said to be in possession it is contended that the 3rd defendant was properly impleaded because she may be regarded as an executor *de son tort* and *Magaluri Garudiah and others* v. *Narayana Rangiah* [1] and *Narayanasawmy Pillai* v. *Essa Abbai Sait, etc.* [2] are relied upon. Even if the 3rd defendant is in possession of joint family property, she cannot be regarded as an executor *de son tort* in regard to it. An

1. (1881) I. L. R. 3 M. 359.
2. (1905) I. L. R. 28 M. 351.

executor *de son tort* is a person who intermeddles with the estate of a deceased person. The joint family property cannot be regarded as the estate of Subbaraya Chetty. The interest he had in it passed at dis death to his co-parceners by suvivorship. The cases quoted are both cases in which the estate of a deceased person had been intermeddled with. The mere fact that the 3rd defendant may have family property in her possession cannot give the plaintiffs a cause of action against her in a suit like the present, as the District Judge has properly pointed out.

The next question is whether the suit is maintainable as against the first and second defendants. The cause of action is stated in the plaint to have arisen on the 16th December 1901 or in July 1902. How any cause of action against the defendants accrued to the plaintiffs on the second of these dates is not explained. The first date is the date of the decree in O. S. No. 8 of 1900 and the prayer in the plaint is for the recovery of the amount due under that decree by Subbaraya Chetty. The suit is therefore clearly to recover from the defendants a decree debt due by Subbaraya Chetti, and the question is whether the plaintiffs have any cause of action for such a suit. If the 1st and 2nd defendants were the sons of Subbaraya Chetty, they would be under a pious obligation to pay the decree debt, and the passing of the decree would give a fresh cause of action against them quite independently of the original cause of action on which the suit against Subbaraya Chetty was brought—*Periasami Mudaliar* v. *Seetharama Chettiar.*[1] But being only his undivided brother and nephew they are not bound to pay any debt contracted by him unless contracted for the benefit of the family, and it cannot be said that the debt imposed upon Subbaraya Chetti by the decree was a debt contracted by him for the benefit of the family, whatever was the nature of the debt upon which O. S. No. 8 of 1900 was brought. The decree debt is not the original debt but a new debt altogether—*Peria sami Mudalar* v. *Seetharama Chettiar*[1]—and must of its own force give a cause of action if the plaintiffs are to maintain a suit upon it. I am, therefore, of opinion that the suit was rightly dismissed as against the 1st and 2nd defendants also, and would dismiss Appeal No. 187 with costs.

1. (1903) I. L. R. 27 M. 243.

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In O. S. No. 14 the District Judge found that the suit, as against the 3rd defendant, was barred by S. 244, C. P. C., for the same reasons as in O. S. No. 13. He also found that the suit was barred by the same section as against the 5th and 6th defendants who were parties to O. S. No. 8 of 1900. The third issue framed was, first defendant not having been a party to O. S. No. 8 of 1900, whether the present suit brought on the same cause of action as O. S. No. 8 of 1900 is maintainable? This issue the District Judge found in the negative and dismissed the suit.

That the cause of action in O. S. No. 14 of 1903 was the same as the cause of action in O. S. No. 8 of 1900 was clearly not disputed in the lower Court. Here it is suggested that the cause of action was different because in O. S. No. 8 there was a prayer for dissolution of partnership in addition to the prayer for winding up. The cause of action is not affected by the relief claimed. In O. S. No. 8 it was alleged that the trade stopped in September 1899 and it was prayed that the partnership accounts might be wound up. It is not alleged in O. S. No. 14 that there were any fresh transactions after September 1899 or any accounts to be gone into other than those which had to be gone into in O. S. No. 8. The cause of action for winding up the partnership is therefore clearly the same in both suits. The 5th and 6th defendants were parties to O. S. No. 8 and no fresh suit can be brought against them on the same cause of action. They were, therefore, wrongly impleaded in the present suit. But to a suit for winding up a partnership each partner having a distinct interest must be a party—LINDLEY on *Partnership*, 7th Edition, page 504. This proposition is not disputed, and the 5th and 6th defendants are therefore manifestly necessary parties to any suit for winding up the partnership now in question. They have not been placed on the record as mere *pro forma* defendants. The prayers in the plaint make no distinction between the 5th and 6th defendants and the other defendants but ask for relief against whichever defendant may be found liable. As therefore the 5th and 6th defendants cannot properly be made parties, the whole suit must fail. I would therefore dismiss Appeal No. 188 with costs.

Miller J.:—I agree. The appeals are dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Munro.

In Appeal No. 183 of 1907.

Duvvadu Hari Kistna Chowdury .. (Appellant)*

v.

Venkata Lakshmi Narayana Pantulu and others .. .. Respondents.

Hari Kistna Chowdury v. Lakshmi Narayana Pantulu.

Limitation Act, Art. 144—Onus—Partition—Suit for partial partition—Stranger-purchaser—Hindu Law.

Under Art. 144, it is incumbent upon the person setting up the bar by limitation to prove that the other party or his predecessor in title was excluded from the enjoyment of suit land in denial of his title.

Held also that a purchaser of the share of one of several co-sharers in a plot of land is entitled to bring a suit for partition of that plot of land alone without seeking for a general partition of all the lands belonging in common to the vendor and his sharers. [*Ramasami Chetti* v. *Alagirisami Chetti*[1] commented on. S. A. 175 of 1905 dist.]

Appeals from the decree of the District Court of Ganjam in O. S. No. 10 of 1906.

P.R. Sundaram Aiyar and *P. Nagabhushanam* for appellant.

The Advocate General (P.S. Sivaswami Aiyar), V. Ramesam and *T. V. Narayaniah* for respondents.

The Court delivered the following

JUDGMENT:—The father of the plaintiff obtained a decree against the 5th defendant and in execution thereof brought to sale and purchased the 5th defendant's one-fifth share in the two suit villages. The plaintiffs in the suit out of which these appeals arise sued for partition and for possession of the 5th defendant's one-fifth share in the said villages.

Balakrishnamma, adoptive father of the 2nd defendant, and defendants Nos. 1, 3 and 5 were members of an undivided family. In 1871 they effected a partition. The bulk of the family property was divided by metes and bounds, but the suit villages and some other immoveable property were kept undivided for convenience of enjoyment and were held by the divided members as tenants in common though the actual management was vested in Balakrishnamma who was to pay to each of the tenants in common his share of the income. In January 1893, Balakrishnamma died, and the management was thereafter with the first defendant.

* Appeals Nos. 183 and 184 of 1907. 12th January 1910.

1. (1903) I.L.R. 29 M. 561.

Hari Kistna Chowdury v. Lakshmi Narayana Pantulu.

Two of the issues framed in the suit were :—Whether the suit was barred by limitation, and whether the suit was bad as being a suit for partial partition. The Court found both these issues in the negative and gave a decree for partition. The arguments on behalf of the appellants have been confined to an attempt to show that the findings upon the above issues are wrong.

We shall first deal with Appeal No. 184 which is by the 1st defendant. This defendant in his written statement admitted that the 5th defendant used to receive payments towards his share of the income of the suit lands as long as Balakrishamma was alive. He contended, however, that after Balakrishnamma's death in 1893, the 5th defendant had no enjoyment and that therefore the suit brought in 1906 was time-barred. The article of Sch. II of the Limitation Act applicable to a case like the present is Art. 144, and, to succeed, it was incumbent upon the 1st defendant to prove that the 5th defendant was in denial of his title excluded from the enjoyment of his share of the suit lands—*Jogendra Nath Rai* v. *Baldeo Das*[1]; *Sellam* v. *Chinnammal*[2]; *Illapan* v. *Manavikrama*[3]. This was the view taken by the Court below and it has not been seriously disputed before us. We think the Court below was right in holding that the 1st defendant failed to discharge the burden which rested upon him. The 5th defendant stated, as a witness for the defence, that after the partition of 1871 he never received any share of the produce either from Balakrishnamma or from any one else. In so stating he went further than the 1st defendant himself. There can be no doubt that his sympathies are now with the defendants rather than with the plaintiffs, and no reliance can be placed upon his evidence. Exh. II and S are relied upon. These are written statements filed by the 5th defendant in O. S. No. 1 of 1894 and O. S. No. 10 of 1895, respectively. In these statements the 5th defendant alleged that the partition of 1871 was never acted upon and that he and other members of the family were managing portions of the family lands. He never stated that he was excluded from enjoyment of the suit lands. His object in putting in these written statements was to claim a larger share than he was entitled to under the partition of

1. (1907) I.L.R. 35 C. 961. 2. (1901) I.L.R. 24 M. 441.
3. (1897) I.L.R. 21 M. 153.

1871. This is all the evidence relied upon to prove adverse possession and it is manifestly insufficient.

The remaining question is whether the suit is bad as being a suit for partial partition. The 5th defendant was entitled as tenant in common to one-fifth share not only in the suit villages but also in certain Inam lands. The suit is for partition of his one-fifth share in the suit villages only, that being all that the plaintiff's father bought. In support of the contention that the suit is bad we have been referred to a passage in *Ramasami Chetti* v. *Alagirisami Chetti*,[1] and to an unreported decision of this Court in Second Appeal No. 175 of 1905. In *Ramasami Chetti* v. *Alagirisami Chetti*,[1] it is said :—"It is no doubt the law that the transferee from one or more co-sharers of a portion only of the co-tenancy cannot maintain a suit for partition of the portion transferred to him." For this statement of the law, *Parbati Churn Deb* v. *Ain-ud-deen*[2] is relied upon. As was, however, pointed out in *Radhakanta Shaha* v. *Bipro Das Roy*[3] it was not laid down in that case as a matter of law that a partition of a portion of a revenue-paying estate, when that portion is capable of partition without much inconvenience to other sharers, is absolutely barred by law and *Syed Habibur Rasul Abul Faiz* v. *Ashita Mohan Ghosh and others*[4] and *Uma Sundari Debi* v. *Benode Lal Pakrashi*,[5] are further authority that a suit like the present is not bad. Second Appeal No. 175 of 1905 is clearly distinguishable. There the suit was to recover specific land left by the testator under his will to the plaintiff and could not succeed because the immoveable property of the testator's family had not been divided, and the estator himself could not have claimed any specific portion of the undivided property as his share. We, therefore, hold that the suit is not bad and dismiss the appeal No. 184 with costs.

Appeal No. 183 is by the 2nd defendant. The only difference between this appeal and appeal No. 184 is that there is no admission by the 2nd defendant that the 5th defendant at any time enjoyed his share of the suit property. This, however, is

1. (1903) I.L.R. 27 M. 361.
2. (1881) I.L.R. 7 C. 577.
3. (1904) 1 C. L. J. 40.
4. (1906) 12 C.W.N. 640.
5. (1907) I.L.R. 34 C. 1026.

immaterial, seeing that the burden of proof is upon the 2nd defendant.

We, therefore, dismiss this appeal also with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Ralph S. Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Aiyar.

G. Narayanaswami Naidu Garu, Receiver Nedadavole Estate .. .. .. Appellant* (*Plaintiff*)

v.

Chellapalli Hanumannah .. .. Respondent (*Defendant*).

Narayana-swami v. Hanumannah

Pleader's right of retainer—Extent.

A pleader has no right of retainer in monies realized by him in one cause for his dues in other causes conducted by him.

Second appeal from the decree of the District Court of Kistna at Masulipatam in A. S. No. 218 of 1906 presented against the decree of the District Munsif of Bezwada in O. S. No. 21 of 1905.

The plaintiff in the case is the Receiver in the Nidadavole and Raipudy estates. The plaintiff's predecessor in office was appointed receiver of these estates and Medur estate by a single order of the District Court in a suit brought for the partition of these three estates. That receiver generally employed the defendant, a pleader, to conduct suits arising in those three estates. While so Rs. 500 and odd was recovered by the pleader in execution proceedings from a judgment-debtor of the Nidadavole estate. Even the old receiver expressly wrote to the defendant to remit that amount to him on account of the Nidadavole estate and not to appropriate it for dues of Medur. The defendant having adjusted that amount in his accounts to the fees due to him in respect of Medur suits, the present suit was brought claiming the amount as due for the Nidadavole estate. The defendant pleaded that there were fees due to him in respect of work done for Medur estates ; that the practice between him and the previous receiver for the last 3 years was to treat all moneys received or disbursed for all estates as of one

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* S. A. 546 of 1907. 4th November 1909.

account; that at the time of realisation of the suit amount the receiver was the receiver of all the three estates; that in case he is obliged to sue for his dues he would be met by the plea of limitation and that he was legally as well as under the circumstances pleaded by him entitled to retain the amount for his dues for Medur suits. Both the Courts below upheld all the contentions of the defendant and dismissed the suit with costs. The plaintiff filed this second appeal.

C. R. Tiruvenkata Chariar for appellant.

E. V. R. Sarma for respondent.

C. R. Tiruvenkata Chariar.—A vakil has no general right of lien over moneys recovered by him in one action so as to utilise it for his fees in another, in the absence of an express or implied contract. The matter is left open in *Subba Pillai* v. *Ramaswamy Ayyar*[1] See S. 217 and S. 221, Contract Act, as to agents' lien and Notes of POLLOCK and MULLA at p. 567, 2nd Edn., as to the meaning of 'same business'. Cf. S. 171 of the Contract Act which gives a general lien. Cf. S. 111, C.P.C. The English law is as I state—*Bozon* v. *Bolland*:[2] There may be a general lien as to papers, but not for money. In this case there have been express letters from the plaintiff not to appropriate—*Mackenzie* v. *Mackintosh*[3]; Encyclopædia of the Laws of England, Vol. 1 p. 498; *Hall* v. *Laver.*[4]

E. V. R. Sarma—argued that there was a finding that there was a practice of appropriating sums derived in one case for dues in other cases and that therefore there was an implied contract. S. 217 of the Contract Act applies. The business was one and the same; the employer was one and the same; and the agent, *i. e.*, the vakil, was one and the same. I refer to accounts to show the practice. [*Benson* Offg. C. J.—What could previous practice do in the face of express orders of the Receiver to remit the amount?] They might have been revoked by his subsequent acquiescence. My client has been prejudiced in that he was misled by the acquiescence into not suing for his dues. The plaintiff is therefore estopped.

The Court delivered the following

JUDGMENT:—In the face of the specific instructions contained in Exhibits E and F the defendant had no business

1. (1904) I.L.R. 27 M. 512.
2. (1839) 48 R.R. 121.
3. (1891) 64 Law Times N.S. 706.
4. (1874) 66 E.R. 1158.=Hare 571.

Narayanaswami v. Hanumannah.

to appropriate the amounts realized in execution of the Small Cause decree towards his dues in other cases conducted by him, even if we are to assume a previous course of practice according to which it was usual to make such appropriations. It is not suggested that these instructions were subsequently cancelled or varied. The cases cited by Mr. Tiruvengatachariar are good authority for the position that a solicitor has no right of retainer in moneys realized by him in one cause for his dues in other causes conducted by him. See *Bozen* v. *Bolland*[1], *Hall* v. *Laver*,[2] *Mackenzie* v. *Mackintosh*[3]. A pleader in India has no higher rights. S. 217 of the Contract Act does not help the defendant. We must, therefore, reverse the decrees of the Courts below. The plaintiff will have a decree for Rs. 556-14-4 with interest at 6 per cent. from the 1st June 1903 to this date with further interest at 6 per cent. on the whole sum until realization not exceeding 6 months from this date. The plaintiff is entitled to his costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.* Chief Justice, and Mr. Justice Krishnasami Aiyar.

Ponaka Subba Rani Reddi .. Appellant*

v.

Vadlamudi Seshachulam Chetty & others. .Respondents.

Subba Rani Reddi v. Seshachulam Chetty.

Specific Relief Act, Ss. 15, 17—*Contract for sale of lands by some on behalf of themselves and some minors—Contract found not binding on minors—Contract indivisible—Decree, form of.*

In a suit for specific performance of a contract to sell lands by some of the defendants on their own behalf and on behalf of other defendants who were minors if it be found that the contract is indivisible, and not binding on the minors, a decree cannot be passed compelling a conveyance of the interest of the minors as well by the major defendants on whom the contract was found binding. [*Srinivasa Reddi* v. *Siva Rama Reddi*[4] distinguished.] But the plaintiff is entitled to take a conveyance by the major defendants of all their interests in the properties for the purchase-money agreed upon without abatement or compensation, if he be so willing.

Second appeal from the decree of the District Court of Nellore, in A. S. No. 3 of 1907 presented against the decree

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* S. A. No. 1237 of 1907. 30th November, 1909.

1. (1839) 48 R.R. 121.
2. (1842) 66 E.R. 1158.=1 Hare 571.
3. (1891) 64 L. T. (N.S.) 706.
4. (1908) I. L. R. 32 M. 320.

of the Court of the District Munsif of Nellore in O. S. No. 27 of 1905.

Subrahmania Aiyar for appellant.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT:—The defendants Nos. 1 to 4 entered into a contract with the plaintiff to sell him certain lands for Rs. 1,400. He brings the suit to enforce specific performance. The Courts below have dismissed the suit. Defendants Nos. 2 and 3 were minors and the contract was entered into on their behalf by the first defendant as their guardian. It is found that the contract was not for purposes binding on the minors and therefore no specific performance could be decreed against their interests in the properties. The contract being one and indivisible the Courts below have dismissed the suit even against defendants Nos. 1 and 4. In second appeal the plaintiff asks for a decree against the shares of the 1st and 4th defendants at least. This, we think, he cannot have. S. 17 of the Specific Relief Act is against him. Ss. 14, 15 and 16 of the Act do not enable the contract to be separated as regards the 1st and 4th defendants in this case. The plaintiff relies on the decision in *Gurusamy* v. *Ganapathiah*[1]. The contract in that case was before the Specific Relief Act. The decree, therefore, which the Court felt itself competent to make at page 344 of the report would appear to be justifiable under the law as it stood before the Act—see *Barrow* v. *Scammall*[2]. Such a course does not appear to be warranted by the proviso to S. 15. COLLECT remarks in his book on the *Specific Relief Act*: "Probably the proviso in S. 15 was framed to meet the difficulties which have thus arisen in English cases." If the contract is indivisible under S. 17 of the Act, what then is the reliefto which the plaintiff is entitled? We are asked by the appellant to give him a decree for the whole against the 1st and 4th defendants on the authority of *Srinivasa Reddi* v. *Siva Rama Reddi*[3]. This we are unable to do. That was a case in which the contract was entered into with the manager of a Hindu family. It was sought to be enforced against him and another member not a party to the contract. Although it was found that

1. (1882) I.L.R. 5 M. 337. 2. (1887) 19 Ch. D. 175.

3. (1908) I.L.R. 33 M. p. 320.

Subba Rani Reddi v. Seshachulam Chetty.

it was not binding on the person who was not a party to the contract, the Court passed a decree against the contracting party for specific performance, leaving the question open as regards the binding character of such conveyance as between the purchaser and the junior member who was no party to the contract. It is unnecessary for us to express an opinion as to the correctness of the observations in the case as regards the true interpretation of S. 15 of the Specific Relief Act. It is enough for us to say that the present case is different because the contract is one entered into on behalf of the minors as well, and the suit is, therefore, properly brought for enforcement of the contract against them also. We cannot, therefore, treat the finding that the contract is not binding on defendants Nos. 2 and 3 as uncalled for. The decision in *Kosuri Ramaraju* v. *Jvaluri Ramalingam*[1] recognizes this distinction. It follows that no decree can be passed compelling a conveyance of the interest of the 2nd and 3rd defendants as well by the 1st and 4th defendants. The appellant, however, expresses his willingness to take a conveyance by the 1st and 4th defendants of all their interests in the suit properties for the purchase money agreed upon without abatement or compensation.

We think he is entitled to this decree. In reversal, therefore, of the decrees of the Courts below, we direct that on payment within three months from this date of the balance of the purchase-money by the plaintiff, the 1st and 4th defendants do execute a conveyance of their interests in the suit properties in favour of the plaintiff. As the plaintiff did not agree to this course in the Courts below we direct him to pay the costs of the respondents.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Venkatarama Aiyar and another .. Appellants*
v. (*Plaintiffs*)
Essumsa Rowthen and others .. Respondents
(*Defendants*).

Venkatarama Aiyar v. Essumsa Rowthen.

C.P.C., (1882) *Ss.* 230 244, 276, 295,—*"Parties to suit"—Representatives claiming under the same party—Applicability of S.295—Attachment of decree, when takes effect—*

* S. A. 1153 of 1907. * 7th December 1909.

1. (1902) I.L.R. 26 M. 74.

Alienation "during the continuance of attachment"—Attachment and alienation on the same day—Onus of proving that alienation was after attachment—Receipt of notice no judicial act—Mortgage—Substitution of securities—T. P.A., Ss. 44, 73.

Venkatarama Aiyar v. Essumsa Rowthen. — Chief Justice.

A mortgagee of a mortgage decree can bring a suit for sale of the mortgaged decree and the purchaser may proceed to execute the decree which he has purchased.

S. 244, C.P.C., is no bar to a suit by a mortgagee of the mortgage decree for recovery of the mortgage amount from the amount in Court deposit realized in execution of the decree mortgaged.

A question arising between the mortgagee of a decree and the attaching decree-holders of the mortgagor (decree-holder) is not a question arising between the parties to the suit within the meaning of S. 244 C.P.C., (1882), both the parties deriving their title from the mortgagor-judgment-creditor only.

Where a person took a mortgage of a mortgage decree after 12 years from the date of the decree which was under execution at the time, the mortgagee of the decree is entitled to the benefit of the execution, and S. 230, C.P.C. (1882) is no bar to a suit by the mortgagee to recover the mortgage amount due to him from moneys realized by the mortgagor (decree-holder).

Under S. 273, C.P.C. (1882), attachment only takes effect from the date of the receipt of the notice by the Court whose decree is attached. A transaction which is *prima facie* valid can only be invalidated by the attaching decree-holder showing to the satisfaction of the Court that the alienation was made during the pendency of the attachment. [*Satya Charan Mukerji* v. *Mahdub Chunder*[1] referred to.]

Where an attachment and a private alienation are both made on the same day, the alienation will prevail over the attachment, in the absence of proof that the alienation was made during the continuance of the attachment, *i.e.*, after receipt of the notice by the Court whose decree is attached.

The legal fiction that every judicial act should be presumed to have been done at the earliest point of time, even assuming it applies to all judicial acts without qualification, is not applicable to the receipt of a notice of attachment by a Court, the same not being a judicial act.

It is essential to a valid claim for rateable distribution that the assets should have been realised in execution of the decree of the attaching decree-holder. Any arrangement entered into by an attaching decree-holder with the judgment-debtor for making the money realized in execution of the judgment-debtor's attached decree available to the attaching creditor cannot avail the subsequent attaching creditors of the same judgment-debtor, who can only put forward claims enforceable under the attachment of the prior attaching creditor.

A mortgagee of a mortgage decree is entitled to enforce his lien on the money realized in execution of the decree mortgaged. [*Singaravelu Udayan* v. *Ramayar*[2] dissented from.]

S. Srinivasa Aiyar for appellants.

The Advocate General (P. S. Sivaswami Aiyar) and *T. R. Venkatarama Sastri* for respondents.

The Court delivered the following

JUDGMENTS.—*The Chief Justice*:—I have read the judgment which my learned brother is about to deliver and I concur

1. (1905) 9 C. W. N. 693. 2. (1903) 13 M. L. J. 306.

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with regard to the question whether the plaintiff has a lien on the money in deposit in the Munsif's Court. It seems to me, on further consideration, that the view taken in the judgment of this Court to which I was a party in *Singaravelu Udayan* v. *Ramayer*[1] was wrong, and that it is not supported by the decision in *Gunney* v. *Seppings*[2] to which reference is made in the judgment.

I think the decree of the Courts below should be modified in the manner indicated in the judgment of my learned brother, and that the respondents should pay the appellants' costs throughout.

Krishnaswami Aiyar J.:—The 1st defendant mortgaged the decree in O.S. No. 254 of 1891, against defendants Nos. 2 to 9 on the file of the District Munsiff of Mannargudi, to the plaintiff. The mortgage deed is dated the 3rd of November 1904. The 10th defendant who had obtained a Small Cause decree against the 1st defendant on the file of the Subordinate Judge's Court of Tanjore attached the decree in O. S. No. 254 of 1891 under S. 273 of the Civil Procedure Code of 1882. This order of attachment was received by the Mannargudi Munsiff on the 3rd of November, *i. e.*, the same day as the date of the mortgage. Defendants Nos. 11 and 12, other decree-holders against the first defendant, attached the said decree subsequently to the plaintiff's mortgage, in execution of their respective decrees. The 10th defendant having afterwards withdrawn the attachment, the 1st defendant executed his own decree in O. S. No. 254 of 1891 and realised the sum of Rs. 801 which was kept in deposit to the credit of that cause in the District Munsiff's Court of Mannargudi. The plaintiff's suit is for the recovery of his mortgage amount from the amount in deposit. Both the Courts below have concurred in dismissing the suit, as against the money in deposit. The 1st question for decision is whether S. 244 of the Code of Civil Procedure of 1882 bars the suit. It is contended for the respondent that the plaintiff is the assignee of the decree-holder in O. S. No. 254 of 1891 and is bound therefore to apply in execution of that decree for the realisation of the amount due under it and cannot institute a separate suit. It is unnecessary to consider for the purposes of this case whether a mortgagee of a decree is an assignee within the meaning of

1. (1903) 13 M.L.J. p. 306. 2. (1846) 15 L.J. (Ch.) 385.

Venkatarama Aiyar v. Essamsa Rowthen. — Krishnaswami Aiyar J.

S. 232 of the Code of Civil Procedure, 1882. There can be no doubt, however, that as mortgagee he can sue his mortgagor for the sale of the mortgaged property (see A. A. O. Nos. 107 to 109 of 1906) and the purchaser may then proceed to execute the decree which he has purchased. The present suit, it must be remembered, is not for the realisation of the amount due by the judgment-debtors of the 1st defendant but for recovery of the plaintiff's claim from the amount in deposit to the credit of the 1st defendant in O. S. No. 254 of 1891. The questions arising between the plaintiff and the 1st defendant or those arising between the plaintiff and the 10th, 11th and 12th defendants are not questions arising between the parties to the suit No. 254 of 1891 or their representatives. S. 244 of the Code of Civil Procedure, 1882, cannot therefore bar the present suit.

It is again urged for the respondent that on the date of the mortgage to the plaintiff execution of the decree in O. S. No. 254 of 1891 had become barred under S. 230 of the Code of Civil Procedure, 1882, and that, therefore, no interest passed to the plaintiff under his mortgage. This contention is clearly untenable. In the first place the decree in O. S. No. 254 of 1891 was then under execution, an application for execution being pending which had been preferred within twelve years from the date of the decree. The plaintiff as mortgagee of the decree was certainly entitled to the benefit of the execution. In the second place, assuming that a fresh application by the plaintiff would become barred, the plaintiff is not seeking to execute any decree more than twelve years old but only proceeding to recover by suit the amount due to him from moneys realised by the 1st defendant. It is difficult to see how S. 230 of the Code of Civil Procedure of 1882 can affect the plaintiff's right.

It is next contended that the plaintiff's mortgage is subsequent to the 10th defendant's attachment and that the plaintiff is postponed to the 10th defendant and also to the 11th and 12th defendants who, though their own attachments were later than the plaintiff's mortgage have, it is said, valid claims enforceable under the 10th defendant's attachment. The same attachment of the 10th defendant was as already stated, on the same date as that of the plaintiffs' mortgage.

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Under S. 273 of the Civil Procedure Code, 1882, it only takes effect on the receipt of the notice by the Court whose decree is attached. At all events a private alienation by the holder of the decree attached is void under S. 276 of the Civil Procedure Code, 1882, only if made during the continuance of the attachment, "duly intimated and made known" in the manner provided by S. 273. It is plain that a transaction which is *prima facie* valid, can only be invalidated by the attaching decree-holder showing to the satisfaction of the Court that the alienation was made during the pendency of the attachment—*Satya Charan Mukerji* v. *Madhub Chunder Karmakar*[1]. The 10th defendant has clearly failed to show it. It is argued that the receipt of the notice by the Mannargudi Munsif was a judicial act, and must be presumed to have been done at the earliest point of time on the 3rd of November, while the alienation in favour of the plaintiff being a private transaction he is bound to show the actual time at which the transaction was concluded. Reliance is placed upon the decisions in *Wright* v. *Mills*[2] and *Clarke* v. *Bradlaugh*[3]. These decisions do not support the respondent's contention. In the latter case a writ of summons was held not to be a judicial act and the legal fiction, assuming it was applicable to judicial acts without qualification, as to which doubts were expressed, was held inapplicable to a writ of summons. It is impossible to suppose that the receipt by the Mannargudi Munsif of the notice of attachment issued by the Subordinate Judge of Tanjore was a judicial act to which such a fiction could be applied. It follows, therefore, that the defendant has not shown that the alienation in favour of the plaintiff was during the pendency of an attachment.

S. 276 of the Civil Procedure Code, 1882, cannot then, in my opinion, invalidate the mortgage. But assuming the above view to be erroneous, the attachment of the 10th defendant was withdrawn by Exhibit J. It was strenuously argued by the learned vakil for the respondents that Exhibit J was not an absolute withdrawal of the attachment but conditional on the money realised by the 1st defendant in execution of his

1. (1905) 9 C. W.N. 693. 2. (1859) 4 H. & N. 488.
3. (1881) 8 Q. B. D. 63.

decree being kept in deposit. But the condition having been fulfilled the withdrawal of the attachment must take effect according to the terms of Exhibit J. No attachment of the money in deposit was substituted in place of the attachment of the decree. It is difficult to hold that notwithstanding the terms of Exhibit J the attachment continued as before so as to invalidate the alienation in the plaintiff's favour under the terms of S. 276 of the Civil Procedure Code, 1882. Defendants Nos. 11 and 12, however, stand in a distinctly worse position. Their attachments were later than the mortgage. They are *prima facie* postponed to the mortgagee. The money realised was not realised in execution of the decrees of any of the attaching decree-holders. The 1st defendant executed the decree in O. S. No. 254 of 1891. Defendants 11 and 12 would not, therefore, be entitled to any rateable distribution under S. 295, Civil Procedure Code, 1882, out of moneys realised by the 1st defendant in execution of his decree, after the 10th defendant had withdrawn his attachment. It is essential to a valid claim for rateable distribution that the assets should have been realised by the 10th defendant executing the 1st defendant's decree by way of executing his own decree. If we are to assume that under Ex. J the 10th defendant entered into a special arrangement with the 1st defendant for making the money realised by the 1st defendant in execution, available to the 10th defendant to the extent of his claim, such an arrangement cannot avail the 11th and 12th defendants who can only put forward claims enforceable under the 10th defendant's attachment as entitled to priority against the plaintiff's mortgage. In the view here expressed it is unnecessary to consider the conflicting views propounded by the Bombay High Court in *Sorabji Edulji Warden* v. *Gobind Ramji F. W. Wadia and another*, [1] and by the Allahabad High Court in *Manohar Das* v. *Ram Antar Pandi*[2] as to the meaning of the phrase "claims enforceable under the attachment" in S. 276 of the Civil Procedure Code, 1882.

There is yet another argument advanced by the respondents which remains to be noticed. It is contended by Mr. Venkatarama Sastry that the decree in O. S. No. 254 of 1891 being no longer in existence by reason of the decree amount having been

1. (1891) I. L. R. 16 B. 91. 2. (1903) I. L. R. 25 A. 431,

Venkatarama Aiyar v. Essumsa Rowthen. — Krishnaswami Aiyar J.

realised in execution, the plaintiff's mortgage is at an end and the plaintiff has no lien on the moneys in deposit in the Munsif's Court of Mannargudi but only against the 1st defendant. The decision in *Singaravelu Udayar* v. *Ramayer*[1] is cited in support of this view. With great respect to the learned Judges who decided this case, I am unable to follow this decision. *Gurney* v. *Seppings*[2] cited therein, does not appear to support the view expressed in that case. The Lord Chancellor allowed the mortgagee to proceed with his action against the mortgagor on condition of his depositing the money realised in Court as security for the sub-mortgagee. Relying on this case, COOTE observes at page 880, Vol. II (seventh Edition) of his *Law of Mortgages*: "If the debt is got in by the original mortgagee he is bound to apply it in discharge of the sub-mortgage." See also FISHER on *Mortgages*, page 854. No reference is made in *Singaravelu Udayan* v. *Ramayer*[1] to S. 73 of the Transfer of Property Act and to the principle underlying that section. There are numerous authorities in support of the position that the mortgagee is entitled to a charge upon the property which through no fault of the mortgagee, has taken the place of the mortgaged property. It is well-known that the money or the property given by Government in substitution for the lands taken up under the Land Acquisition Act is charged in favour of the mortgagee who had his claim upon the property so taken. See *Vira Ragava* v. *Krishnasami*,[3] *Jotoni Chowdhurani* v. *Amor Krishna Saha*[4]. The charge upon the proceeds of a sale of mortgaged property for arrears of revenue or of rent declared by S.73 of the Transfer of Property Act is recognised in *Gosto Behary Pyne* v. *Shib Natt Dut*[5], in *Beni Prosad Sinha* v. *Rewat Lall*[6] and *Kamalakanh Sen* v. *Abdul Barkat*[7]. Where an undivided share in property is mortgaged and the mortgagor gets specific property in lieu of the share on partition, it has been held that the mortgage is a valid encumbrance on the substituted property—*Byjnath Lall* v. *Ramoodeen Chowdry*[8] *Hem Chunder Ghose* v. *Thako Moni Debi*[9]; *Joy Sankari Gupta* v. *Bhata Chandra*

1. (1903) 13 M.L.J. 306.
2. (1848) 15 L.J. Ch. 385.
3. (1882) I.L.R. 6 M. 344 at 347.
4. ( ) 13 C.W.N. 361.
5. (1892) I.L.R. 20 C. 241
6. (1897) I.L.R. 24 Cal. 746.
7. (1899) I.L.R. 27 C. 180.
8. (1874) L.R. 1 I.A. 106.
9. (1893) I.L.R. 20 C. 533.

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Bardhan[1]; *Lakshman* v. *Gopal*[2]; *Amolak Ram* v. *Chandan Singh*,[3] and S. 44 of the Transfer of Property Act. The puisne mortgagee is on the same principle entitled to a charge on the surplus sale proceeds on a sale under the first mortgage—*Bhamdeo Pershad* v. *Tara Chand*[4]. It would be difficult indeed to hold that so far as the 1st defendant (the mortgagor) is concerned he would be at liberty to realise his decree and deal with the proceeds to the prejudice of his mortgagee, the plaintiff. As regards defendants Nos. 10, 11 and 12 if there be any force in their contention it affects them quite as much as the plaintiff for they merely attached the decree of the 1st defendant and not the amount realised in execution of it and they, not having therefore any lien upon the amount in deposit, are not entitled to raise any objection to the plaintiff obtaining a decree against the 1st defendant and the amount which stands to his credit. As already observed, however, I am inclined to hold that the plaintiffs have a valid charge on the amount in deposit in the Munsif's Court at Mannargudi. I would modify the decrees of the Courts below and declare that the plaintiffs are entitled to a lien for the amount decreed, on the amount in deposit in the District Munsif's Court at Mannargudi to the credit of the 1st defendant in O. S. No. 254 of 1891 and that the plaintiffs are entitled to draw that sum from that Court inexecution of this decree. The respondents will pay the appellant's costs throughout on the amount decreed by the Courts below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Krishnaswami Aiyar.

Natla Bapiraju .. .. .. (Appellant) *

v.

Puram Achuta Rajaju and another .. (Respondents).

Natla Bapiraju v. Achuta Rajaju.

Madras Acts—Abkari Act, S. 13—Partnership of unlicensed person with a licensed one.

S. 13 of the Madras Abkari Act does not prohibit a person having no license from holding an interest in the manufacture or vend of liquor jointly with a licensed manufacturer or vendor. [*Marudamuthu Pillai* v. *Rangasami Moopan*[5] distinguished.]

Second appeal from the decree of the Court of the Subordinate Judge of Cocanada in A. S. Nos. 417 and 418 of 1904 presented against the decree of the Court of the District Munsif of Cocanada in O. S. No. 664 of 1898.

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* S. A. No. 1308 of 1907. 20th January 1910.

1. (1895) I.L.R. 20 C. 533.
2. (1899) I.L.R. 26 C. 434.
3. (1895) I.L.R. 23 B. 385.
4. (1902) I.L.R. 24 A. 483.
5. (1901) I.L.R. 24 M. 401.

Natla Bapiraju v. Achuta Rajaju.

V. Purushothama Aiyar for Advocate-General for appellant.

P. Narayanamurthi for respondents.

The Court delivered the following

JUDGMENT:—On the second occasion on which this case came before the appellate Court, the parties agreed that an account should be taken by a Commissioner upon the result of which a decree should be made.

When the case came again on appeal from the District Munsif's decree after the account was taken, an objection was raised that under the license granted to the defendants, the contract of partnership between them and the plaintiff was illegal. The Subordinate Judge sustained this objection and dismissed the suit. The license is not on record and it is impossible for us to say that the partnership contravenes any condition therein set forth: but it is now contended that apart from the license, the partnership is illegal as being prohibited by the Abkari Act, and S. 13 is referred to. We do not think that S. 13 prohibits a person who has no license from holding an interest in the manufacture or vend of liquor jointly with a licensed manufacturer or vendor, and the authority relied on.—*Marudamuthu Pillai* v. *Rangasami Mooppan*[1]—does not compel us to hold that this is the effect of the section. In that case it was held that the conditions of the license were in accordance with the policy of the Act but not that the Act itself prohibits a partnership between a licensed vendor and another. The decision in S. A. No. 870 of 1906 evidently proceeded on the view which we take; it was there held that a partnership entered into before the provision in the conditions of a license of a legal prohibition against transfer and sub-letting, could not be held to be an illegal partnership. In this case too the partnership was commenced before the date on which this prohibition in such license was legally promulgated by the Commissioner of the Abkari Revenue, but not having the license before us, it is unnecessary for us to consider how that would affect the matter if at all.

We must reverse the decree of the Subordinate Judge and remand the A. S. Nos. 417 and 418 for disposal on the merits in pursuance of the agreement between the parties. The costs will abide the results.

The memorandum of objections is not pressed and is dismissed with costs.

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1. (1901) I.L.R. 24 Mad. 401.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar

Minakshi Ammal .. Appellant* (*Defendant*)

v.

Visvanatha Aiyar .. Respondent (*Plaintiff*).

Minakshi Ammal v. Visvanatha Aiyar.

Will—Mutual and joint wills—Revocability by one after the death of the other—"Advantage"—Meaning of—Estoppel.

Two persons may agree to make mutual wills which remain revocable during the joint lives of either with notice to the other, but become irrevocable after the death of one of them if the survivor had taken advantage of the provisions made by the other. The advantage so taken should be one obtained by the survivor *under* the provisions of the will.

Per *Krishnaswami Aiyar* J.—It is not competent to any person to set up that the will is irrevocable in the absence of a plea that there was an arrangement between the two persons who made their wills that each should stand by the other.

A husband and his wife made, by means of a single testimentary instrument, dispositions of their separate properties in favor of their daughters and a daughter's son. The husband died; and subsequently the wife made a gift to her daughter of her property disposed of by her already in the joint will in favor of the plaintiff, her grandson. The dispositions were to take effect under the will only after the death of both the husband and the wife.

Held that the will of the lady was revocable and that the advantage that she derived by inheriting her husband's estate after his death not being one derived under the will but under the ordinary law of inheritance governing the parties, she was not precluded from revoking the will by a subsequent disposition.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 950 of 1906 presented against the decree of the Court of the District Munsif of Valangiman in O. S. No. 315 of 1905.

The facts appear sufficiently from the judgment.

P. S. Subrahmania Aiyar for appellant.—A mutual or a joint will is revocable by the survivor in respect of the properties belonging to him unless he has taken some benefit under the will of the other. THEOBALD, 6th Ed. p. 17; JARMAN, Vol. i, p. 93 (10th Ed.), *Stone* v. *Hoskins*[1]; *Denyssen* v. *Mostert*[2]; *Lord Walpole* v. *Lord Orford*[3]. As explained by the President in *Stone* v. *Hoskins*[1] the lady took no benefit under the will of her husband.

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* S. A. 1428 of 1907. 9th December 1909.

1. (1905) P. 194.

2. (1872) L. R. 4 P. C. 236.

3. (1797) 30 E. R. 1076=3 Ves. 402.

Minakshi Ammal v. Visvanatha Aiyar. — Chief Justice.

T. R. Krishnaswami Aiyar for respondent—relied on *Dufour* v. *Pereira*[1]; *Williams*, Vol. i., p. 94., *et seq* (1905 Ed).

The Court delivered the following

JUDGMENTS :—*The Chief Justice.*—In this case one Subbier and one Sesha Ammal who were the father and the mother of the defendant in the suit and the grandfather and grandmother of the plaintiff (the plaintiff being the son of the defendant) made a joint will in December 1897.

In the year 1899 the testator died. In the year 1904 the testatrix executed a gift to her daughter, the defendant, of the amount which the plaintiff in the present suit claims he is entitled to recover from the defendant as a legacy bequeathed to him by the will.

Now if the testatrix's will is irrevocable, and that is the view taken by the District Judge, the plaintiff is entitled to succeed.

If, on the other hand, the testatrix's will is "revocable" it must be taken that it had been duly revoked or superseded by the gift in 1904 to the defendant and the plaintiff is not entitled to succeed.

That was the view taken by the District Munsif who dismissed the suit.

The will is to this effect. It recites that the testator and the testatrix have no male heirs and have only female heirs and that they have made the arrangements set forth in the will so that their daughters and their heirs may have no misunderstandings after their death in respect of the immoveable and moveable properties possessed by them. Then the will proceeds to refer to properties of the value of Rs. 800, which belonged to the testator, and to property of the value of Rs. 1,200 which belonged to the testatrix making Rs. 2,000 in all. Then the two properties are dealt with together. Out of the Rs. 2,000 one daughter is to take Rs. 800 and pay Rs. 400 to another daughter. The eldest daughter is to take Rs. 1,200 and out of that pay Rs. 400 to another daughter's son. Then the will further provides that the heirs of the eldest daughter—the eldest daughter being the mother of the plaintiff—shall perform the funeral ceremony and that the eldest daughter shall pay Rs. 400 to the plaintiff after the funeral ceremonies. We will take it that the plaintiff fulfilled the condition precedent

1. (1769) 1 Dick 419.

as regards the performance of the funeral ceremonies. If, therefore, the disposition under the will is irrevocable he is entitled to recover this Rs. 400.

The law with regard to the question we have to decide is laid down in THEOBALD on *Wills*, 6th Edn., p. 17—"Persons may make joint wills which are, however, revocable at any time by either of them or by the survivor." * * * "A joint will may be made to take effect after the death of both testators; and if the joint will is not a disposition by each testator of his own property but a disposition of joint property after the death of the survivor, the will cannot be proved till the death of the survivor." * * * * It seems that two persons may agree to make mutual wills which remain revocable during the joint lives of either with notice to the other, but become irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other. A similar statement of the law is to be found in WILLIAMS on *Executors*, 10 Edn., p. 94, and in JARMAN on *Wills*, 1893, 5th Edn, Vol. I, page 27.

With regard to the authorities, so far as I am aware, the only authority which can be said in any way to support the contention advanced by the plaintiff, who is the respondent before us, is a judgment of Lord *Camden* which is very shortly reported in a case in Chancery decided so long ago as 1769 (*Dufour* v. *Pereira.*[1]) That case, however, was discussed and distinguished in the later case of *Walpole* v. *Orford*,[2] and the decision in that case is clearly against the plaintiff's contention that the will is irrevocable. The Privy Council case *Denyssen* v. *Mostert*[3] is an appeal from the Cape of Good Hope, and it turns at any rate to some extent on questions of Roman and Dutch Law. So far as I know, there is nothing in that case which helps the contention put forward on behalf of the plaintiff. But the most recent and, as it seems to me, the clearest exposition of the law on this question is that given by Lord *Barnes* (Sir *Gorell Barnes* as he then was) in the case of *Stones* v. *Hoskins*[4]. At page 197 he says:—"It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor has taken a benefit by that death, the view is perfectly well formed that the survivor cannot depart

1. (1769) Dick. 419.
2. (1797) 30 Eng. Rep. 1076.
3. (1872) L.R. 4 P.C. Ap. 236.
4. (1905) P. 194.

from the arrangement on his part, because by the death of the other party the will of that party and the arrangement have become irrevocable, but that case is entirely different from the present, where the first person to die has not stood by the bargain and her 'mutual' will has, in consequence, not become irrevocable." By the "mutual will" he means the will made by the survivor. "The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death."

Applying that principle to the facts of the case before us, we have to see whether it can be said that the survivor has taken a benefit. It was suggested that she took a benefit by the death of the co-testator. That may be. It may be that, in that case, if the wife died first, the husband took a benefit, and if the husband died first, the wife took a benefit; but the benefit so taken was under the ordinary law and not under the provisions of the will. As I understand the will, there is nothing which gives the surviving testator or testatrix a benefit on the death of the testator or testatrix who predeceases.

No doubt the object of the will was to give the issue certain advantages. These advantages would accrue to the issue on the death of both the testator and the testatrix and not before. But we should be extending the equity doctrine if we were to hold that it applied to an advantage of that sort. The advantages contemplated by the doctrine and recognized in the cases apparently is a benefit or an advantage obtained by the survivor under the provisions of the will. Now, I do not think it possible to say that that happens in this case. I must hold that in my judgment the District Munsif is right and the District Judge is wrong. I come to this decision with some reluctance, but the law seems to me to be so clear that I can come to no other conclusion. The result is that the decree of the lower appellate Court is set aside and that of the District Munsif restored with costs throughout.

Krishnaswami Aiyar J.—I agree with the learned Chief Justice. The suit is to enforce a legacy. A will was made by the plaintiff's grandparents. It is called a mutual will. So far as one can see from the language of the instrument, it really is a

will by two persons, each of his or her own property, but the dispositions are contained in one paper. In this case no agreement or arrangement between the testator and the testatrix is alleged, and in none of the cases that have been discussed by the learned Chief Justice was it held competent to any person to set up that the will was irrevocable in the absence of a plea that there was an arrangement between the persons who made their wills that each should stand by the other.

Now, as I have already said, the dispositions contained in this will are dispositions by each of his or her own propeity, and as the plaintiff has not started his case with any allegation of an arrangement between the two, it seems to me that the plaintiff is bound to fail on this very ground. But assuming that there was an arrangement to be implied from the language of the instrument, even then it is clear on the authorities that it cannot be said that the wills are irrevocable. For, it is plain upon the cases that have been discussed that, in order that the will should be irrevocable, it is necessary that the person attempting to revoke it should have received a benefit under the will of the other.

Now in this case if the wife died first I think it would be impossible to contend that the husband would succeed to the properties. She disposed of the properties after the death of the husband, it is true, in favor of her daughters and the plaintiff a daughter's son. But so far as any intermediate estate is concerned, that is the estate undisposed of by the will, it will pass under the law of intestacy to the daughters and not to the husband. It may be that, so far as the husband is concerned, if he dies first, his life estate will pass to the widow, but it passas not under the terms of the will but under the law of intestacy. But, so far as I have been able to understand the authorities, it is only in cases where a benefit is received by a mutual testament under the terms thereof that he or she can be said to be precluded from revoking the wlil. I come, therefore, to the conclusion that the will is really superseded by the gift which the testator has made. The gift deals with properties which are dealt with by the will and if all the properties dealt by this will are disposed of by this gift there is no property left upon which the will could operate. The second appeal must therefore be allowed, the decree of the District Judge reversed, and that of the District Munsif resored. The plaintiff must pay the costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Ekkanath Eachara Unni Valia Kaimal (died)
Achutan Unni Valia Kaimal, legal representative of the 1st appellant .. Appellants* (*Defendants and the legal representatives of the 1st Defendant*)

v.

Mannakhat Vasunni Elaya Kaimal and others .. Respondents (*Plaintiff and Defendants 2 to 5*).

Achutan Unni v. Vasunni.

C. P. C. (V of 1908) S. 99—Scope of non-joinder of parties—Practice—Parties —Malabar Law—Karnavan, arrangements by—When can be impeached by successor.

S. 99, C. P. C., applies to the case of non-joinder as well.

It is sufficient to implead the Karnavan alone of the tarwad as defendant, without impleading the other members, to a suit on an agreement executed by a previous Karnavan for maintenance.

Per *Krishnaswami Aiyar* J.—The question as regards the propriety of the arrangement made by a previous Karnavan is open to the succeeding Karnavan to raise ; but an arrangement that was *bona fide* and proper at the time when it was entered into cannot be subsequently attacked by the succeeding Karnavan on the ground that the property given for maintenance gives a larger income at the date of suit than it was expected to yield at the time when it was allotted.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 126 of 1907 presented against the decree of the Court of the Subordinate Judge of South Malabar at Palaghat in O. S. No. 36 of 1905.

M. Kunjunni Nair for appellants.

T. R. Ramachandra Aiyar and *T. R. Krishnasami Aiyar* for respondents.

The Court delivered the following

JUDGMENTS :—*The Chief Justice*:—The main defence in this suit was that Ex. *B* which is an arrangement which was entered into by the 1st defendant's predecessor-in-office as Karnavan of the Tarwad and the plaintiff's predecessor-in-interest had been revoked. The District Judge finds that it has not been revoked. This is a question of fact which is binding on us in second appeal.

Then, on behalf of the appellant, it was argued that Ex. *B* is not binding on him as the successor-in-office of the man by whom the agreement was entered into. I feel some doubt as to whether we should allow this point to be raised before us at all,

*S. A. 1277 of 1907. 20th December 1909.

because the judgment of the learned District Judge, as I read it, strongly suggests that the point was never taken before him. The learned Judge refers to the fact in the 4th paragraph. The 1st defendant's Vakil supports the decree on the gronnd that the suit should be dismissed on the first issue, *i.e.* non-joinder. But it does not say that any discussion took place before him with reference to the question as to whether Ex. *B* was binding or not binding, apart from any question of revocation, on the 1st defendant.

The agreement purports, as I read it, to have been entered into by the 1st defendant's predecessor-in-office on behalf of the Tarwad and I see no reason for holding that it is not binding on his successor-in-office, the 1st defendant.

The further point which was argued before us was the question of parties, and it was contended that the suit ought to have been dismissed on the ground of non-joinder. Now the plaintiff in the present suit is the manager of the Tavazhi, the 1st defendant is the manager of the Tarwad, and certain members of the plaintiff's Tavazhi have been made supplemental defendants. The point as to alleged *non-joinder* is this, that all the members of the 1st defendant's Tarwad should have been made defendants to the suit. On behalf of the appellant we were referred to the decision, in *Maunnali* v. *Pakki*[1] That was a suit for increase of maintenance against the Karnavan of the Tarwad and it was there held by this Court that all the members of the Tarwad were necessary parties to that suit. I think that case is clearly distinguishable from the case before us. In *Maunnali* v. *Pakki*[1] the suit was for an increase of the rate of maintenance and it was not based upon any agreement entered into by the Karnavan. The present suit is on an agreement to pay maintenance at a specified rate executed by a former Karnavan and, as I have said, I see no reason for holding that the agreement is not binding on the tarwad. It purports to be entered into by the Karnavan, representing the Tarwad. In these circumstances the present case in regard to the question of the suggested *non-joinder* is not governed by the decision in *Maunnali* v. *Pakki*[1]. In any way, it seems to me that we may hold, under S. 99 of the present Code of Civil Procedure, we are not called upon to give effect to the objection in regard to parties.

1. I.L.R. 7 M. 428.

Achutan Unni v. Vasunni

Chief Justice.

It is contended that S. 99 speaks only of *mis-joinder* of parties or causes of action. But it has been held by this Court in *Mahabala Bhatta* v. *Kunhanna Banta*[1], for the purpose of construing the section to which the present S. 99 corresponds, that the word *mis-joinder* includes *non-joinder*. I think that the second appeal must be dismissed with costs.

Krishnasami Aiyar J.—I agree. The appellant attacks the judgment of the District Judge on the ground that Exhibit *B* is not binding upon him because the property allotted for the maintenance of the plaintiff's branch gives at present a larger income than it was expected to yield at the time when it was allotted. It seems to me that this is not a sufficient ground for modifying an arrangement that was entered into by a Karnavan. The question as regards the propriety of the arrangement made by the Karnavan in 1879 is certainly open to the present Karnavan to raise. But if it was a *bona fide* and proper and prudent arrangement to make at the time it was entered into, it seems to me that the ground on which that arrangement is now attacked is not available to the present representative of the Tarwad.

As regards non-joinder, in the circumstances of this case, it is at best an irregularity, which does not vitiate the decision on the merits, and therefore S. 99 of the present Code of Civil Procedure would seem to be sufficient to dispose of that objection. But, looking at the question on the merits, it seems to me that it is not clear that there is non-joinder in this case. The contention is open to exception. The suit is brought upon an arrangement entered into by a Karnavan against the successor of that Karnavan. It is sought to enforce it against him in his capacity as the Karnavan of the Tarwad. In such a suit he represents all the other members of the Tarwad and therefore it would seem to me to be unnecessary to make the other members parties, though if they made an application at the eariest possible stage to join on the record as parties to the suit, such an application ought to be favourably viewed. There was no such application in this case. Nor was there any application by the 1st defendant that the other members should be joined as parties. The mere objection, therefore, that they have not been joined seems to me to be of no validity whatever in a suit brought like the present one for

1. (1898) I. L. R. 21 M. 373 at p. 382.

the enforcement of an arrangement made by the predecessor of the present Karnavan. I agree in dismissing the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Krishnaswami Aiyar.

Arayil Kali Amma and others .. Appellants* (*Defendants* 1 *to* 7.)

v.

Palappakkara Manakal and others .. Respondents.

Kali Amma v. Palappakkara Manakal.

Limitation Act, S. 30, Art. 177—Second appeal—Application to bring in legal representative—Limitation, rule of procedure—General clauses Act, S. 6—Co-Uralans, suit against—Appeal abating against one abates against all—Parties.

S. 30 of the Limitation Act does not apply to applications, and an application put in after Act IX of 1908 came into force for bringing in the legal representative of a respondent in a second appeal who died six months before the date of application is barred by Art. 177 of Act IX of 1908.

Limitation is not a rule of substantive law; and S. 6 of the General Clauses Act has no application to a curtailment of the period of limitation by a new Act.

Co-Uralans are joint trustees of the temple and its properties and it is not open to a person to present an appeal against some only of the Co-Uralans who had obtained an injunction decree against the appellant; and consequently, a second appeal which abates against one respondent becomes unsustainable against all.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 87 of 1905 presented against the Court of the District Munsif of Ponnani in O. S. No. 192 of 1904.

M. Kunjunni Nayar.—The 3 year's period within which I could bring the legal representative of a respondent in a second appeal who died before the new Limitation Act came into force cannot be held to have been taken away by the new Act unless it expressly states so—*Khusalbai* v. *Kabhai*[1].

C. V. Anantakrishna Aiyar.—S. 3 of the new Limitation Act says that all applications made after its coming into force are to be governed by that Act. Compare S. 30. [*Krishnaswami Aiyar* J.—Supposing on the date of the coming into force of the Act the appellant who had 3 years allowed six months to run on, then is he not deprived of all right?] No. There was a period of four months between the passing of the Act and its coming into force. For the bearing of this fact on the inter-

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* S.A. 656 of 1906. 7th January 1910.

1. (1881) I. L.R. 6 B. 26.

Kali Amma. v. Palappakkara Manakal.

pretation of the statute see *Khusalbai* v. *Kabhai.*[1] Maxwell, p. 336, and Craies, Statutory Law, 327-331, state that matters of procedure are to be governed according to the law existing at the time—*Q.* v. *Leeds & Bradford Railway Company*[2]; *The Government of Bombay* v. *Dorabji Balabhai*[3]; *Chajmal Das* v. *Jagdamba Prasad*[4]. S. 5 of the new Act is wider in that it includes all applications and not only applications for review.

The Court delivered the following

JUDGMENT:—In this case the 4th respondent died on the 9th December 1907. No application has been made till now to bring his legal representative on the record. The question is whether the second appeal abates under S. 108 read with order XXII, rule 11, and rule 4 of the Code of Civil Procedure. The time provided by the Limitation Act of 1877 was not six months under Article 175 (*c*) but 3 years under Article 178 according to the ruling of the Full Bench of this Court in *Susya Pillai* v. *Aiyakannu Pillai*[5]. But this period has been cut down to six months under Article 177 of the Limitation Act of 1908. If this article applies the second appeal must abate as regards the 4th respondent.

According to S 3 of Act IX of 1908 an application to bring in the legal representative now made must be dealt with under this Act. S. 30 of the Act makes a special provision in respect of suits for which a shorter period is provided by the new Act than by the old, giving a further period of two years after the Act when the plaintiff would be barred if the new period were applied. But there is no similar provision in the case of an application. S. 6 of the General Clauses Act X of 1897 has no application so as to preserve the older period of limitation which is not a rule of substantive law. The decision in *Chajmal Das* v. *Jagdamba Prasad*[4] seems to be exactly in point. The fact that in this case an application to bring in the representative would be barred on the very date of the coming into force of the new law fixing the shorter period cannot affect the principle applicable as has been pointed out in the English cases referred to in *Khusal Bhai* v. *Kabhai.*[1] There is no objection to the application of the new

1. (1881) I.L.R. 6 B. 26 at p. 30.
2. (1769) 21 L J. M. C. 193.
3. (1874) 11 B. H.C. 117 A. Cr.
4. (1889) I.L.R. 11 A. 408.
5. (1906) I.L.R. 29 M. 529.

rule on the ground of hardship when the Legislature has postponed the coming into operation of the new Act to the 1st January 1909, though it was passed on the 7th August 1908. The facts of the case in *Kusalhai* v. *Kabhai*[1] are not clear and the principle of that case is distinguishable having regard to the interval of time between the passing of the Act and its coming into force. We agree with the decision in *Reg.* v. *Sorabji Balabhai*[2]. Kali Amma v. Palappakkara Manakal.

We must hold that the second appeal abates as against the 4th respondent.

It is objected by the respondents that the appeal cannot proceed as against the other respondents as well. The respondents were Co-Uralans of a Devasom and have obtained a decree for an injunction and damages against the appellants. Co-Uralans are joint trustees of the temple, and its properties. It is not open to the appellants to prosecute the appeal against some of the trustees leaving the decree of the District Court intact in favour of the others.

We must dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Krishnasamy Aiyar.

Velammal and another .. .. .. Appellants*

v.

Vavammal and others .. .. .. Respondents.

Specific Relief Act, S. 42—Suit for declaration that mortgage decree not binding on plaintiff's share—Limitation. Velammal v. Vavammal.

A suit for a declaration that a mortgage-decree is not binding on plaintiffs' share of the property if brought within 6 years from the date of the decree is not barred by limitation ; nor is such a suit barred by S. 42 of the Specific Relief Act by reason of the want of a prayer for a general partition even though the sharers have been impleaded as parties.

Second appeal from the decree of the District Court of Madura in A. S. No. 386 of 1906 presented against the decree of the Court of the District Munsif of Manamadura in O. S. No. 215 of 1904.

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* S. A. No. 682 of 1907. 18th January 1910.

1. (1881) I. L. R. 6 B 26. 2. (1889) I.L.R. 11 B.H.C. 117 A. Cr.

Velammal v. Vavammal.

S. Srinivasa Iyengar for appellant.
C. Madhavan Nair for respondents.

The Court delivered the following

JUDGMENT:—We do not think the suit is barred by limitation so far as the prayer is for a declaration that the decree on the hypothecation does not bind the share of the plaintiffs. That decree was passed within six years before the institution of the suit.

Nor can we accede to the contention that the suit for a declaration is barred by S. 42 of the Specific Relief Act. The plaintiffs ask in substance that it may be declared as against the hypothecation that the decree is not binding on their share in the property and the fact that they have impleaded the other sharers does not make it obligatory on them to sue for a general partition. We do not think the decision in *Suryanarayana Murthi* v. *Sammama*[1] compels us to hold otherwise.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Krishnaswami Aiyar.

Subramanya Mudali and others .. Appellants*

v.

Velu and another .. .. Respondents

Subramanya Mudali v. Velu.

Hindu Law—Maintenance—Illegitimate sons—Adulterous offspring—Claim against deceased father's undivided brothers.

The illegitimate son of a Sudra, though the offspring of an adulterous intercourse, is entitled to maintenance from the undivided brothers of his deceased father who take the father's estate by survivorship.

Obiter:—Intercourse with a married woman is not always a crime, and there is no warrant in Hindu Law for refusing maintenance to offsprings by adulterous intercourse on the ground of their criminal origin.

Second appeal from the decree of the Subordinate Judge's Court of Madura (West) in A. S. No. 219 of 1906, presented against the decree of the Court of the District Munsif of Madura in O. S. No. 264 of 1904.

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*S. A. No. 888 of 1907. 2nd February 1910.

1. (1901) I.L.R. 25 M. 504.

Subramaniam Mudali v. Velu.

T. Rangachariar for appellant—contended that an illegitimate son of a Sudra born of an adulterous and incestuous union is not entitled to maintenance against the surviving brothers of the deceased putative father. As observed in *Dattaparisi Naidu* v *Datta Bangaru Naidu*[1] the Hindu Law "knows no such general term as 'illegitimate son.'" It only recognises the rights of certain kinds of illegitimate sons. Cases have established that illegitimate sons of a Sudra born of a woman continuously kept, the union not being of an adulterous and incestuous nature, are entitled to inherit their putative father's estate; also that illegitimate sons, however born, are entitled to maintenance against their putative father—*Sikki* v. *Venkatasamy*[2]; *Veeramuthi* v. *Singaravelu*[3]—or perhaps if the case *Ananthaya* v. *Vishnu*[4] is held to apply to Sudras, against the legitimate sons of the putative father. But even illegitimate sons entitled to inherit are excluded when the father died undivided from his brothers—*Krishnayyan* v. *Muthusamy*[5]; *Ranoji* v. *Kandoji*[6]; *Gopalswami Chetty* v. *Arunachellam Chetty*[7]. It is equally clear that all illegitimate children are not entitled to maintenance—*Lingappa* v. *Esudasan*[8]. The basis of the claim of illegitimate children for maintenance being that they are members of the family of their father, though not entitled to a share—*Ananthaya* v. *Vishnu*[4]; *Gopalasamy Chetty* v. *Arunachellam Chetty*[7]—it must follow that persons born of an adulterous or incestuous union ought not to have any right to maintenance. According to the old theory the owner of the *kshetra* being the owner of the child, on the principle that the person that is responsible for the maintenance of a child born of a married woman is the husband of the mother or his estate and not the putative father or his estate. The reasoning that excludes the illegitimate son from succeeding to the father when he dies undivided from his brothers must *a fortiori* exclude him from maintenance against the surviving members of the family. The Court ought not to extend recognition to concubinage and illegitimacy beyond what the law and the decisions have laid down—*Dattaparisi Naidu* v. *Datta Bangaru Naidu*[1]; S. A. 57 of 1905[9] where it was only the case of a concubinage

1. (1869) 4 M. H. C. 204.
2. (1875) 8 M.H. C. 144.
3. (1877) 1 M. 306.
4. (1893) I. L. R. 17 M. 160.
5. (1883) I. L. R. 7 M. 407.
6. (1885) I. L. R 8 M. 557.
7. (1903) I. L. R. 27 M. 32.
8. (1903) I. L. R. 27 M. 13.
9. (1909) 20 M.L.J. p. 355.

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with a widow. *Rahi* v. *Gobind*[1] proceeds upon the footing of custom and has no general application. Cited MANU, Ch. 5, v. 161; pp. Mayne 586 *et seq.*

K. N. Aiya for respondent—relied on *Gopalsamy Chetty* v. *Arunachellam Chetty*[2].

The Court delivered the following

JUDGMENT:—This is a suit for maintenance by the illegitimate sons of one Chidambara Mudali, deceased, against his undivided brothers and their sons. The Subordinate Judge has decreed the plaintiff's claim with some modification as regards the amount and the defendants appeal. It has been assumed by the Subordinate Judge for the purpose of his decision, that Umayal, the mother of the plaintiffs, was a married woman who was living with Chidambara Mudali as his concubine.

The first question is whether the plaintiffs are entitled to maintenance, and the second, whether they are entitled to it against the father's undivided brothers and their sons in consequence of their having taken the father's share of the family property by survivorship. It is altogether useless to consider whether the Hindu Law, as regards the claims of illegitimate sons as now administered, is in accord with the ancient Hindu Texts or even the authoritative commentaries. It is true the High Court of Calcutta still adheres to the literal interpretation of the texts, holding that the illegitimate son entitled to inherit amongst Sudras is the son of the female slave. See the cases of *Narain Dhara* v. *Rakhal Gain*[3]; *Kirpal Narain Tewari* v. *Sukurmoni*[4], and *Ram Sarain Garain* v. *Tekchand Garain.*[5] But this High Court as well as the High Courts of Bombay and Allahabad have adopted the view that an unmarried woman kept as a continuous concubine is on the same footing as the female slave with reference to the rights of the illegitimate sons born to them—see the cases of *Krishnayyan* v. *Muthusami*[6]; *Ranoji* v. *Kandoji*[7]; *Rahi and others* v. *Govindavalad Teja*[8];

1. (1875) I. L. R. 1 B. 97.
2. (1903) I. L. R. 27 M. 32.
3. (1875) I. L. R. 1 C. 1.
4. (1891) I. L. R. 19 C. 91.
5. (1900) I. L. R. 28 C. 194.
6. (1883) I. L. R. 7 M. 407.
7. (1884) I. L. R. 8 M. 557.
8. (1875) I. L. R. I B. 37.

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Sadu v. *Baiza and Genu*[1]; *Sarasuti* v. *Manu*[2], and *Hargobind Kuari* v. *Dharam Singh*[3]. But even this rule as to the mother being an unmarried woman has been relaxed as regards the illegitimate son's right to maintenance—see the cases of *Venkatachella Chetty* v. *Parvatham*[4]; *Viramuthi Udayan* v. *Singaravelu*[5] where the claimant was the offspring of an adulterous intercourse; and so also in the case of *Kuppa* v. *Singaravelu*[6]. In the case of *Rahi and others* v. *Govind Velad Teja*[7] the Bombay High Court decided that the illegitimate son by an adulterous intercourse was entitled to maintenance.

The next question is whether the decree against the surviving members of the family is right. In *Chouturya Ruk Murden Syn* v. *Sahub Purhulad Syn*[8] a decree for maintenance was made by the Privy Council in favour of an illegitimate son by a Sudra concubine against a successor to the Raj of the putative father. In *Muthusami Jegavara Yettappa Naicker* v. *Vencateswara Yettaya*[9] the same tribunal awarded maintenance to the son of the concubine of a Sudra Zamindar and directed an enquiry as to the existence of private property of the putative father and in its absence as to the charging the income of the Zamindari with the amount of maintenance.

In both these cases the estates concerned would seem to have been impartible and at least one of them descendible according to the rule of survivorship. In *Ananthaya* v. *Vishnu*[10], *Muthusamy Aiyar* and *Best* JJ. charged the maintenance awarded to the illegitimate son against the family properties in the hands of the survivors. And in *Gopalasami Chetti* v. *Arunachellam Chetti*[11] a decree was passed by *Benson* and *Bashyam Aiyangar* JJ. against the brothers and legitimate sons of the putative father.

It has, however, been argued that whatever justification there may be for passing such a decree in favour of illegitimate sons by a concubine who was not a married woman, such a decree is improper when the claimants are the offspring of an adulterous

1. (1879) I. L. R. 4 B. 37.
2. (1880) I. L. R. 2 A. 134.
3. (1894) I. L. R. 16 A. 329.
4. (1871) 8 M.H.C.R. 134 at p. 134.
5. (1877) I. L. R. I M. 306.
6. (1885) I. L. R. 8 Map. 325.
7. (1875) I. L. R. 1 B. 97.
8. (1857) 7 M. I. A. 18.
9. (1868) 12 M. I. A. 203.
10. (1893) I. L. R. 17 M. 160.
11. (1900) I. L. R. 27 M. 32.

ubramanya Mudali v. Velu.

intercourse. It is difficult to suggest any principle upon which this distinction can rest. Although this Court has refused to give a decree for a share to the illegitimate son of a Sudra where he is the offspring of an adulterous intercourse (see the cases of *Dattaparisi Naidu* v. *Datti Bangaru Naidu*[1] ; *Venkatachella Chetti* v. *Parvatham*[2] ; *Annayan* v. *Chinnan*[3]) his claim to maintenance has always been recognised. We are aware of no instance where such a claim, if valid against the putative father, has not been held good against the surviving members of the joint family who have taken his share by survivorship. In *Viramuthu Udayan* v. *Singaravelu*[4] the claim was recognised against the legitimate sons who presumably took the property by survivorship. In *Ananthaya* v. *Vishnu*[5] it was pointed out by *Muthusamy Aiyar* and *Best* JJ., that as the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, etc., are to be met, the maintenance decreed to an illegitimate son may be secured on the family property. If this be the correct theory on which maintenance is awarded, we can see no distinction between the case of the offspring of an adulterous intercourse and the illegitimate son by an unmarried woman in so far as they are entitled to maintenance against the putative father or the successors to his property.

It has been contended that where the illegitimate son is the offspring of an adulterous intercourse no rights should accrue as he comes into being by a violation of the criminal law. But intercourse with a married woman is not always a crime. And though there is authority for the position that the criminal himself should not acquire rights by the crime (see the case of *Vedanayaga Mudaliar* v. *Vedammal*[6], there is no warrant for holding that the offspring of a criminal intercourse should be deprived of all rights. It is difficult to find in the Hindu Law, which recognised twelve sorts of sons, including the *Kshetraja* and the *Gudhaja*, a negation of rights of maintenance on the ground of the criminal origin of a class of illegitimate sons. At all events we cannot develop any new legal theory for the sake

1. (1868) 4 M. H. C. R. 204.
2. (1875) 8 M. H. C. R. 134.
3. (1909) S. A. 57 of 1905 reported in 20 M.L.J. p. 355.
4. (1877) I. L. R. 1 M. 306.
5. (1893) I.L.R. 17 M. 160 p. 161.
6. (1901) I.L.R. 27 M. 591.

of denying to illegitimate sons of married women, maintenance against the surviving members of the putative father's joint family when it has already been judicially allowed against the fathers themselves.

We are, therefore, constrained to hold that the decree of the Court below is right and we dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Benson.

Annayyan .. Appellant *

v.

Chinnan *alias* Muni Venkata Chetti and others .. Respondents.

Annayyan v. Venkata Chetti.

Hindu Law—Illegitimate son—Rights of inheritance—Illegal or forbidden intercourse—Estoppel of tenant—Scope of principle.

An illegitimate son who is born of a connection forbidden by the customary law governing the parties (*e.g.*, in this case, the connection being with a widow who is not allowed to remarry) has no rights of inheritance to the property of his father.

[*Vencatachalla Chetty* v. *Parvatham*[1] considered.]

Meaning of the phrase "unmarried Sudra woman" examined.

The estoppel of a tenant from denying his landlord's title extends only to the person who let him into possession, or to his successor in interest; and consequently if a person entitled to the lands gains possession of the land by collusion with the tenant in possession by getting the tenant to attorn to him, he will get a good title as against all persons but those who let the tenant in possession.

K. Bashyam Aiyangar for appellant.

V. Purushottam Aiyar for *The Advocate-General* (*P. S. Sivaswami Aiyar*) for 3rd respondent.

Second appeal from the decree of the District Court of Salem in A.S. No. 275 of 1903, presented against the decree of the Court of the District Munsif of Krishnagiri in O.S. No. 235 of 1902.

This second appeal came on for hearing on the 4th November 1907, when the Court directed that the District Judge of Salem should submit his findings on the following issues, viz:—

(1) Was Krishnappa dead at the time when the 1st defendant was begotten?

(2) On what date did Venkatasami (the 1st witness for the plaintiff) attain majority?

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* S. A. No. 57 of 1905. 8th December 1909.

1. (1875) 8 M. H. C. R. 134.

(3) Did Venkatasami or the 3rd defendant get possession of the plaint land, and if so, when ?

And if the finding on issue No. 1 is in the affirmative, then :

(4) Is the remarriage of widows allowed by the usage of the class of Sudras to which the mother of defendant No. 1 belongs ?

In compliance with the above order the District Judge found (1) that early in October, 2nd defendant consented to attorn to 3rd defendant, after which nothing more happened till February-March, when the latter began to receive the rent from him and in that sense to hold possession of the land, and (2) that re-marriage was not allowed.

The Court delivered the following

JUDGMENT :—We think that the decree of the District Judge is right.

The facts necessary for the purposes of this appeal may be thus stated :—

The relationship of the principal parties is as follows:—

Venkatagiri — Pillanan (died 1883)

Pillanan (died 1883) → Venkatasamy (who sold to 3rd defendant.)

Venkatagiri → Timaraya — Kept Sanjivammal

Timaraya — Kept Sanjivammal → 1st defendant (who sold to plaintiff).

The lands in dispute originally belonged to Pillanan who died in 1883. His brother, Venkatagiri, unlawfully took possession of them in 1884, and on his death possesssion passed to his son, Timaraya, who died in 1896, and the land then passed into the possession of the 1st defendant who was the illegitimate son of Timaraya by his kept woman, Sanjivammal. The possession by the 1st defendant and his father and grandfather was adverse to Venkatasamy from 1884 onwards. That possession was held through a tenant, the 2nd defendant, who was the actual occupant of the land. On the 29th September 1900, Venkatasamy sold his interest in the land to the 3rd defendant who induced the 2nd defendant, who was the tenant in actual possession, to attorn to

him. The attornment was in October 1900, and payment of rent by the 2nd defendant to 3rd defendant was certainly made in February 1901, and afterwards. The 3rd defendant thus obtained possession of the land in October 1900. In the same month the 1st defendant sold his interest to the plaintiff, and as the defendants Nos. 2 and 3 refused to give him rent or possession, he brought this suit for possession and mesne profits: Annayyan v. Venkata Chetti.

The question is as to the respective rights of the 1st defendant and Venkatasami. The District Judge found in favour of Venkatasami. The plaintiff, who claims under the 1st defendant, appeals. It is sought to support the claim of the 1st defendant by the fact that he and his predecessors were in adverse possession from 1884 until possession was lost in October 1900 or March 1901 by his tenant collusively attorning to the 3rd defendant who had purchased Venkatasamy's interest. But it is found that Venkatasamy came of age only in 1898. He might, therefore, have sued to recover possession of the land on the strength of his title at any time up to the end of 1900. In other words the 1st defendant's title by adverse possession had not been gained before Venkatasamy regained possession by the tenant (the 2nd defendant) attorning to him in October 1900. It is argued that Venkatasamy could not regain legal possession by collusion with the 1st defendant's tenant, and reliance is placed on the case of *Pasupathi* v. *Narayana.*[1] No doubt that would be so, if the tenant had been let into possession by the 1st defendant, or his predecessor in interest; but there is no evidence that this was so. The 2nd defendant would, therefore, not have been estopped from denying the 1st defendant's title. Venkatasamy, being the true owner, was not estopped from recovering possession by inducing the tenant in possession to attorn to him.

In these circumstances it must be held that the plaintiff's title by adverse possession has not been established and he has no right to eject the 2nd and 3rd defendants

On another ground also he must be held to have no title. He claims through the 1st defendant, who is the illegitimate son of Timaraya by Sanjivammal. This Sanjivammal became a widow while still a child, and it appears that Timaraya lived with her continuously as his concubine. It has been found that

1. (1889) I.L.R. 13 M. 335.

Annayyan v. Venkata Chetti.

remarriage of widows is forbidden among Sudras of the class to which the 1st defendant belongs, and the District Munsif points out that Timaraya and Sanjivammal were, in fact, outcasted by their community in consequence of their living together.

The 1st defendant was, therefore, the offspring of a connection forbidden by their customary law, and no authority has been cited to show that such an offspring has any rights of inheritance to the property of his father. No doubt the rule is well established in Madras that the illegitimate son of a Sudra by "an unmarried Sudra woman" is entitled to a share of the family property, if the concubinage was continuous, and if the connection was not incestuous or adulterous, or in violation of, or forbidden by law—*Yettappa Naicker* v. *Venkataswara Yettia*[1]; *Dattiparisi Nayudu* v. *Datti Bangaru Nayudu*[2]; *Venkatachella Chetty* v. *Parvatham*[3]; *Krishnayyan* v. *Muthusami.*[4] It is argued by the appellant's vakil that the words "unmarried Sudra woman" in the text of the Hindu Law, (*Dayabhaga*, Ch. 9, V. 29), on which the rule is founded, do not mean a woman who has never been married at all to any one, but mean "a woman who has not been married to the father of the child," and there is an *obiter dictum* in the case of *Venkatachella Chetty* v. *Parvatham*[3] that is "at least doubtful" whether the words are not limited in the latter sense. It is also pointed out that in Bombay the condition that the woman should never have been married has, in practice, been disregarded—*Rahi and others* v. *Govind Valad Teja*[5]. But, as Mr. MAYNE points out, in all the Bombay cases, the connection with the married woman was not an adulterous one, but was sanctioned by usage having the force of law. No case has been cited in this Presidency where the offspring of such a concubinage, as there was in the present case, has been held entitled to inherit as an illegitimate son, and we are not disposed to extend the rights of illegitimate sons beyond the limits laid down by the authorities.

We must hold that the second appeal fails on this ground also.

We therefore dismiss it with costs.

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1. (1868) 12 M. I.A. 203.
2. (1869) 4 M. H. C. R. 204.
3. (1875) 8 M. H. C R. 134.
4. (1883) I. L. R. 7 M. 407.
5. (1875) I L.R 1 B. 97.

N THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph Benson, Officiating Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Meenakshi Anni .. Appellant*
v. (*Plaintiff*)
Appakutti .. Respondent
(*Defendant.*)

Meenakshi Anni v. Appakutti

Hindu Law—Inheritance—Illegitimate son—Widow—No exclusion of illegitimate son by widow.

The illegitimate son of a Sudra is not excluded by the widow.

Obiter:—If the father leaves a widow, daughter or daughter's son, but no male issue, the illegitimate son succeeds as co-heir with the widow, daughter or daughter's son, as the case may be, and as sole heir in default of any other heirs down to a daughter's son.

[*Parvati* v. *Tirumalai*[1] and *Chinnammal* v. *Vardarajulu*[2] explained.]

Second appeal from the decree of the District Court of Tanjore in A. S. No. 417 of 1906 presented against the decree of the District Munsif of Shiyali in O. S. No. 170 of 1905.

Suit by plaintiff, widow of one Sethu Mudali, to recover possession of a house of her deceased husband from the defendant, an illegitimate son. Both the lower Courts held that the plaintiff and defendant were each entitled to half. The plaintiff appealed.

S. Muthia Mudaliar for the appellant.—The widow excludes the illegitimate son. He takes only after the widow. In *Mitakshara*, Chap. I, S. 12, Pl. 1 & 2, the widow is not mentioned as one with whom the illegitimate son takes a share. The widow cannot be excluded as she comes in before the daughter with whom alone the illegitimate son is a co-sharer. So the illegitimate son is excluded. *Rahi* v. *Govind Valad Teja*[3] is wrong. It is doubted in *Shesgiri* v. *Girewa*[4] and *Ambabai* v. *Govind*[5]. *Chinnammal* v. *Varadarajulu*[2] is wrong. It is based on a misapprehension of *Parvati* v. *Thirumalai*[1]. See observation in the last case at p. 346. The observation that the widow does not exclude the illegitimate son in *Ramalinga Muppan* v. *Pavadai Goundan*[6] is mere *obiter dictum*. *Ranoji* v. *Kandoji*[7], *Krishnayyan* v. *Muthusami*[8], *Sri Gajapathi Radhika Patta Mahadevi* v. *Sri*

* S.A. 212 of 1907 26th October 1909.

1. (1887) I.L.R. 10 M. 334.
2. (1892) I.L.R. 15 M. 307.
3. (1875) I.L.R. 1 B. 97.
4. (1889) I.L.R. 14 B. 282.
5. (1898) I.L.R. 23 B 265.
6. (1901) I.L.R. 25 M. 522.
7. (1885) I.L.R. 8 M. 557, 561.
8. (1883) I.L.R. 7 M. 407.

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Gajapathy Nilamony Patta Mahadevi[1] support the view that the widow excludes the illegitimate son. *Dattaka Chandrika*, Ch. V., Ss. 30, 31 is the only text which says that the widow and illegitimate son take together.

P. S. Subrahmania Aiyar for respondent—relied on *Chinnammal* v. *Varadarajulu*[2] and *Ramalinga Moopan* v. *Pavadai Goundan*[3].

S. Mutha Mudaliar replied.

The Court delivered the following

JUDGMENT:—The plaintiff, as the widow of Sethu Mudaliar, claims the entire property of her deceased husband as against his illegitimate son, the defendant. The Courts below gave her a decree for one half of the property. She appeals for the other half alleging that under the Hindu Law, the widow excludes the illegitimate son altogether. We do not think this contention can be upheld. The decision in the case of *Chinnammal* v. *Vardarajulu*[2] is a direct authority against the appellant and though it rests upon a misapprehension of the ground of decision. in *Parvati* v. *Tirumalai*[4] it is supported by the observations at p 343 of the report, and also by the reasoning at p. 559 of the decision in *Ranoji* v. *Kandoji*[5] We think the remarks of Mr. Justice *Bhashyam Aiyangar* in *Ramalinga Muppan* v. *Pavadi Goundan*[3] are correct. He says : "The rights of an illegitimate son in the paternal estate, when the father has died a separated holder, have now been clearly defined by judicial decisions" and adds at p. 522: "If the father left a widow, daughter or daughter's son but no legitimate male issue, the illegitimate son succeeds as co-heir with the widow, daughter or daughter's son as the case may be, and as sole heir in default of any other heir down to a daughter's son." The *ratio decidendi* in the case of *Parvati* v. *Thirumalai*[4] is not, as supposed in the case of *Chinnammal* v. *Varadarajulu*[2] that the widow is preferable to the illegitimate son in the case of an impartible estate though it may be supported on that ground. Reliance was then placed on the decision

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1. (1870) 13 M. I A. 497 at 506.
2. (1892) I.L.R. 15 M 307 at 314.
3. (1901) I.L.R. 25 M 523.
4. (1887) I.L.R. 10 M 334.
5. (1885) I.L.R. 8 M557.

Meenak Anni v. Appaku

of Mr. Justice *Holloway* and Mr. Justice *Innes* in regular Appeal No. 86 of 1865, wherein it was held that the widow excluded the illegitimate son altogether though the estate to which succession was claimed does not seem to have been impartible property. We have referred to the decision in that case which, however, it must be noted in passing, was reversed by the Privy Council on another ground (see *Ramamani Ammal* v. *Kulanthai Natchiar*).[1] The opinion of the learned Judges in that case was based on the text of YAJNAWALKYA without reference to the commentary of the *Mitakshara* and the passage in 1 STRANGE'S *Hindu Law*, III Edition, page 69, citing it. The text of YAJNAWALKYA simply postpones the illegitimate son till after the daughter's son. The *Mitakshara*, however, (see Ch. I, S. 12, Pl. 1 and 2) expressly lays down that he participates for half a share with a daughter or daughter's son. The *Mitakshara*, therefore, repudiates the idea of being postponed. We cannot, therefore, treat the decision in Regular Appeal No. 86 of 1865 or the remarks in *Parvati* v. *Tirumalai*[2] based upon it, as of binding authority. It must also be pointed out that they are opposed to the reasoning at page 559 in *Ranoji* v. *Kandoji*[3]. As the widow excludes the daughter and as the daughter, according to the express text of the *Mitakshara*, shares with the illegitimate son, it follows that the widow cannot be excluded altogether by the illegitimate son as supposed in the earlier Bombay cases. The authority of those cases, has, however, been doubted in *Seshagiri* v. *Girewa*[4] and *Ambabai* v. *Govind*[5]. It is not easy to explain why the *Mitakshara*, while mentioning the daughter who is not named by YAJNAWALKYA in the text commented on, does not mention the widow as well. Whatever the reason may be, the illegitimate son who is declared entitled to half the share of a legitimate son amongst Sudras cannot in reason be excluded by a widow when there is no legitimate son. The express authority of the *Dattaka Chandrika*, Ch. V, Placita 30 and 31, is in favour of the widow sharing equally with the illegitimate son. We may add that MR. MAYNE (see MAYNE'S *Hindu Law*, 7th Edition, S. 551) and MR. GHOSE

1. (1871) 14 M.I.A. 346.
2. (1887) I.L.R. 10 M. 334.
3. (1885) I.L.R. 8 M. 557.
4. (1889) I.L.R. 14 B. 282
5. (1900) I.L.R. 25 B. 271 at p. 265.

(See GHOSE'S *Hindu Law*, 2nd Edition, page 656) are of the same opinion.

We dismiss the second appeal with costs. The memorandum of objections is not pressed and is also dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Gongela Pichi Naidu and others .. Appellants* (*Defendants and 1st Defendant's legal representative*)

v.

Vallur Veeriah and another .. Respondents (*Plaintiffs*).

Gongela Pichi Naidu v. Veeriah.

Pasturage right, nature of—Acquisition of right—Extent of user.

The right of pasture cannot be said to exclude the owner's right to the possession and enjoyment of the property over which such a right may exist.

Quære :—Whether in the case of Government waste, where the owner has no use for the property and is not present on the spot to resist any acts of trifling enjoyment on the part of another, the mere pasturing of cattle by the adjoining ryot would amount to an enjoyment of a right so as to create a presumptive title.

Second appeal from the decree of the District Court of Nellore in A. S. No. 194 of 1904 presented against the decree of the Court of the District Munsif of Kavali in O. S. No. 190 of 1903.

A. Krishnaswami Aiyar for *P. R. Sundara Iyer* for appellants.

K. Bashyam Aiyangar for respondents.

The Court delivered the following

JUDGMENT.—The suit land was unassessed waste, part of the defendant's village of Lakkarajupalle hamlet of Minagavalu. It was granted on dharkast in 1901 to the plaintiffs, ryots of Mahi Malur. They complain of obstruction and dispossession by the defendants and seek to recover it. The defendants in their written statement do not set up title in themselves or adverse possession against the Government. They plead enjoyment of the land for pasture from time immemorial and deny the right of Government to grant it on dharkast. The District Munsif decreed the plaintiff's claim. On appeal the District

* S. A. 37 of 1907. 2nd February 1907.

Judge has confirmed the Munsif's decision. He came to the conclusion that most of the plots in dispute were pattah lands till 1873; that the defendants did not hold the lands for pasture from time immemorial or as of right against the Government, and that they had no rights in unassessed waste against Government. The defendants appeal and set up various contentions. It is unnecessary to set them out at length, for we are of opinion that the only plea that was raised in the written statement was as regards the right of pasture and that has been negatived by the appellate Court. There being no plea of adverse possession it is unnecessary to consider the cases as to what would constitute possession according to the nature and character of the property in question—see *Lord Advocate* v. *Lord Blantyre*[1]; *Lord Advocate* v. *Young* : *North British Railway Company* v. *Young* [2]; and *Van Diemen's Land Co.* v. *Table Cape Marine Board*[3]. Nor is it necessary to determine whether proof of possession for a certain number of years should not lead to the presumption of anterior possession extending to more than the statutory period against the Government—see *Sivasubramanya* v. *Secretary of State for India* [4] ;*The Secretary of State for India in Council* v. *Nellakutti Siva Subramania Tevar*[5]. There are no statutory provisions in this Presidency as in Bombay with reference to the grazing rights of villagers over adjoining Government waste—see *The Collector of Thana* v. *Bal Patel*[6] ; *Trimbak Gopal* v. *The Secretary of State for India.*[7] It is, however, contended that the defendants have acquired a right of pasturage over Government waste, and reference is made to the passage at page 221 in *The Secretary of State for India* v. *Mathurabhai*,[8] where Chief Justice *Sargeant* speaks of "the right of free pasturage, which certain villages enjoy according to the recognised custom of the country." But the learned Chief Justice proceeds to qualify this recognition of such a right by the statement that the right is not necessarily conferred on a particular piece of land but may merely amount to having sufficient land set apart for the purpose of the village. Nor can it be said that the right of pasture excludes the owner's right to the possession and enjoyment of the

Pichi Naidu v. Veeriah.

1. (1879) 4 A. C. p. 770.
2. (1887) 12 A. C. p. 544.
3. (1906) A. C. p. 92.
4. (1885) I L. R. 9 M. 285.
5. (1891) I. L. R. 15 M. 101.
6. (1877) I. L. R. 2 B. 110.
7. (1896) I. L. R. 21 B. 684.
8. (1889) I. L R. 14 B. 213.

Pichi Naidu v. Veeriah.

property over which such a right may exist—see *Rama Saran Singh* v. *Birju Singh.* [1] It may, perhaps, be doubted whether in the case of Government waste where the owner has no use for the property and is not present on the spot to resist any acts of trifling enjoyment on the part of another (see *Lord Advocate* v. *Lord Blantyre* [2]) the mere pasturing of cattle by the adjoining ryot would amount to an enjoyment as of right so as to create a presumptive title—see *Wali Ahmed Chowdhry* v. *Tota Mea Chowdry.*[3] We do not think we have sufficient materials in this case to enable us to determine the question whether the defendants have acquired a right of pasture and, if so, on what extent of the suit land. The plaintiffs are clearly entitled to possession. We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Sammantha Gramany and others .. Appellants*

v.

Devasikamany Gramany and others .. Respondents.

Sammantha Gramany v. Devasikamani Gramany.

Limitation Act, Art. 127—"*Exclusion*"—*Mere non-participation, no exclusion—Practice—Procedure — Parties -- Non-joinder—Partition suit—C. P. C., O.* 1, *r.* 9. *O.* 41, *r.* 20.

Mere non-participation is not exclusion within the meaning of Art. 127 of the Limitation Act.

Semble :—In a suit for partition, relief cannot be given to one sharer without all the sharers being brought before the Court. It is only if relief can be properly given without all the sharers being brought into Court, that relief can be given by the Court under O. 1, r. 9, C. P. C. But when that cannot be done, the only mode of dealings with the matter in controversy may be to dismiss the appeal unless under O. XLI, r. 20, the absent parties are joined.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 557 of 1906 presented against the decree of the Court of the District Munsiff of Poonamallee in O. S. No. 171 of 1905.

T. R. Ramachandra Aiyar and *A. Sangappa* for appellant.

C. V. Ananthakrishna Aiyar for respondent.

Suit for partition and possession of plaintiffs' ⅓rd share. Both the lower Courts decreed in favour of plaintiffs. Defendants

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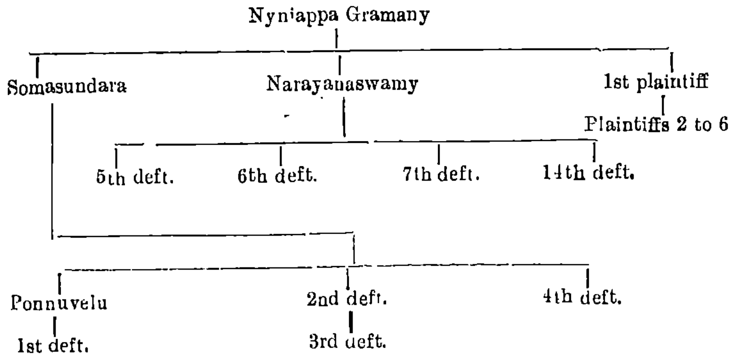
* S. A. No. 1468 of 1907. 3rd February 1910.

1. (1896) I. L. R. 19 A. p 172. 2. (1879) 4 A. C. at p 797.

3. (1903) I L.R. 31 C. at p. 405.

1 to 4 appealed and the question is whether the suit is not barred under Art. 127 of the Limitation Act. Sammantha Gramany v. Devasikamani Gramany.

The parties are Hindus governed by the Mitakshara Law. The following genealogy shows the relationship of the parties :—



A portion of the joint family properties had been divided among the parties in 1888. The suit properties had been left undivided. They were in the sole possession of defendants 1 to 4. The plaint was presented on 22nd March 1905, more than twelve years after the date of the prior partition. Defendants 1 to 4 contended that the suit was barred by limitation.

C. V. Ananthakrishna Aiyar took a preliminary objection that the suit being one for partition and all parties interested not having been made parties to the second appeal (defendants 1 to 4 were appellants and plaintiffs 1 to 6 alone were respondents in the second appeal) the second appeal was defective for want of parties. This objection was overruled.

T. R. Ramachandra Aiyar, on the merits, contended that the possession of defendants 1 to 4 was on their own behalf, and the plaintiffs, not having had enjoyment for more than 12 years, must be taken to have been excluded within the meaning of Art. 127. He cited *Ramachandra Narain* v. *Narayan Mahadevan*[1]; *Vinayak* v. *Datto Govind*[2].

C. V. Ananthakrishna Aiyar cited *Sellam* v. *Chellammal*[3]; *Raj Bahadur* v. *Bharat Singh*[4]; *Mahabala Batta* v. *Kunhanna Batta*[5]; and *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya*[6].

1. (1886) I. L. R. 11 B. 216.
2. (1900) I. L. R. 25 B. 367.
3. (1901) I. L. R. 24 M. 441.
4. (1905) I. L. R. 27 A. 348.
5. (1898) I. L. R. 21 M. 373.
6. (1906) I. L. R. 30 M. 201.

Sammantha Gramany v Devasikamani Gramany.

The Court delivered the following

JUDGMENT:—The plaintiffs sued for partition of a one-third share in undivided family property. Both the Courts below have given them a decree. Defendants Nos. 1 to 4 have preferred this second appeal making the plaintiffs alone respondents without impleading defendants Nos. 5, 6, 7 and 11 to 14 who would be entitled to a third share on the basis of the lower Court's decrees. The respondents contend that the appeal fails for non-joinder of the other defendants. The appellants rely on the fact that they alone are in possession of the suit properties, and on Order 1, Rule 9, which declares that no suit shall be dismissed for non-joinder. The rule proceeds to lay down that the Court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. We are inclined to think that the fact of the appellants alone being in possession does not affect the question. Nor can we accept the contention that we have no power to dismiss the second appeal. In a suit for partition, relief cannot be given to one sharer without all the sharers being brought before the Court. We are inclined to accept the respondent's argument that it is only if properly relief can be given without all the sharers being brought into Court that we may give that relief. But when that cannot be done, the only mode of dealing with the matter in controversy may be to dismiss the appeal unless under Order XLI, Rule 20, the absent parties are joined. We might, in the circumstances of this case have been inclined to add the absent defendants as parties to this second appeal if we had reason to suppose that the appeal was sustainable. We think it unnecessary to express a final opinion on the question of non-joinder as we are clear that the appeal must fail on the merits.

The District Judge has found that there was no exclusion within the meaning of Article 127. The appellant argues on the authority of *Ramachandra Narayan* v. *Narayan Mahadev*,[1] that exclusion should be presumed from the possession of defendants Nos. 1 to 4. We do not think the observations of *West* J. have been accepted as a sound interpretation of Art. 127 in this Court. *Sellam* v. *Chellammal*[2] and *Doorjeti Subbayya* v. *Doorjeti Venkayya*[3] clearly lay down that mere non-participation is not

1. (1886) I.L.R. 11 B. 216. 2. (1901) I.L.R. 24 M. 441.
3. (1906) I.L.R. 30 M. 201;

exclusion. The decree, therefore, in the plaintiffs' favour is right. We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Kurusu Kostha & others .. Appellants * (*Plaintiffs*)

v.

Thommai Savarimuthu Fernand Suthaki and others .. Respondents (*Defendants*).

Kostha v. Savarimuthu

Tort—Special damage—Obstruction of view to a curusady—No special damage to worshipper—No right of suit.

A possible obstruction to a procession is no special damage.

The plaintiffs, certain of the worshippers of St. Jacob's Church brought a suit for removing certain constructions made by defendants on a part of the public road in front of their church, on the ground of obstruction of the plaintiffs' view of a *curusady*.

Held: That the plaintiffs have no cause of action and that the suit was not sustainable.

Second appeal from the decree of the District Court of Tinnevelly in A. S. No. 285 of 1906 presented against the decree of the Court of the District Munsif of Srivaikuntam in O.S. No. 411 of 1904.

T. Rangachariar for appellants.

The Advocate General (*P. S. Sivaswami Aiyar*) and *T. Arumainatham Pillai* for respondents.

The Court delivered the following

JUDGMENT :—This is a hopeless case. The plaintiffs are certain of the worshippers of St. Jacob's Church. They complain of obstruction by certain constructions made by the defendants who represent the Church of the Holy Ghost on a part of the public road in front of their church. It is said that the result of this new construction will be to obstruct the plaintiffs' view of a curusady—a pillar of brick and mortar with a cross on it—and their procession on the public roadway round the curusady.

We are unable to see what right the plaintiffs have to represent the church of St. Jacob. We do not see what connection the curusady has with the church of St. Jacob. The view of the

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* S. A. 1467 of 1907. 10th February 1910.

Kostha v. Savarimuthu.

curusady is no part of the ritual of the church. It is found that there is no established practice of an individual worshipper crossing himself at the sight of the curusady. Even if there was such a practice, we cannot say he is entitled to the protection of the intervening public roadway being kept clear of all obstruction to the view. We think the Judge is right in holding that no special damage has been shewn to give the plaintiffs a right of action. The plaintiffs are not the trustees of the church of St. Jacob. They have not gone in procession round and suffered from the obstruction any special damage.

Nor can we say that a possible obstruction to a procession would be a special damage.

We must dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnasami Aiyar.

Chakkantavida Chakkan Abdula and another .. Appellants *

v.

Thazath Chekkootti and another .. Respondents.

*Abdula v. Chekkootti.

Malabar Law—Tarwad—Gift to members—Right of management of gifted properties.

If properties are gifted to certain members of a Malabar Tarwad the senior member amongst the grantees of property has the right of management in respect of the properties, obtained by gift, though the grantees and their descendants do not become a Tarwad in respect of the gifted properties.

[*Koroth Amman Kutti* v. *Perungottil Appu Nambiar*[1] distinguished and explained. *Kunhacha Umma* v. *Kutti Mammi Hajee*[2] followed.]

Second appeal from the decree of the District Court of North Malabar in A. S. No. 103 of 1907 presented against the decree of the Court of the District Munsif of Badagara in O.S. No. 154 of 1906.

C. V. Anantakrishna Aiyvr for appellants.

J. L. Rozario for respondents.

The Court delivered the following

JUDGMENT:—The plaintiff sues upon a lease granted by the 2nd defendant, the senior of two grantees in *Putravakasam*.

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*S.A. No. 723 of 1908. 10th February 1910.

1. (1906) I.L.R. 29 M. 322. 2. (1892) I.L.R. 16 M. 201.

Abdula v. Chekkootti.

It is argued that a lease by the senior member alone is invalid, and reliance is placed upon certain observations of *Moore* and *Sankaran Nair* JJ. in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* [1]. They have been considered and explained in the judgment of this Court A. No. 26 of 1905. The learned Judges who decided the case *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* [1] are not to be understood as negativing the view that the senior member amongst the grantees has the right of management which a Karnavan would have in respect of the properties obtained by gift. Such a view would run counter to the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* [2]. In *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* [1] the question under consideration was whether the grantees and their descendants became a new Tarwad in respect of the gifted properties. In saying that they did not, the learned Judges did not purport to hold that the senior member amongst the grantees has not the right of management. If they are to hold the properties like a Tarwad there must be a single manager as incident to it. The lease is therefore valid. The second appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Asundi Basavon .. Appellant*

v.

Bareddi Govindappa and another .. Respondents.

Asundi Basavon v. Govindappa

Appellate Court—Functions of—Decree prayed for against two defendants—Decree passed against one—Appeal—No memo of objections—Incompetency of Appeal Court to pass a decree against the other defendant in the absence of prayer.

Plaintiff sued as really entitled on a pronote Executed by 2nd defendant in the name of the 1st defendant. Relief was asked for against 1st defendant for not having collected the money and paid it. The Munsif passed a decree against the 2nd defendant. On appeal by the 2nd defendant the District Judge dismissed the suit. The plaintiff preferred no appeal or memo of objections asking for a decree against the 1st defendant *Held*, that the suit was rightly dismissed by the District Judge and that the Judge was not wrong in not passing a decree against 1st defendant which was not asked for at all in any manner.

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* S. A. No. 9 of 1908. 11th February 1910.

1. (1906) I.L.R. 29 M. 322.

2. (1890) I.L.R. 16 M. 201.

[*Kulai Kada Pillai* v. *Viswanatha Pillai*[1] followed. *Subramania Chetty* v. *Veerabadran Chetty*[2] and *Kuppusami* v. *Vijiyanayanar*[3] distinguished.]

Asundi Basaven v. Govindappa.

The Hon'ble *L. A. Govindaraghava Aiyar* for appellant.

V. C. Seshachariar for respondent.

Second appeal from the decree of the District Court of Bellary, in A. S. No. 154 of 1906, presented against the decree of the Court of the District Munsif of Hospet in O. S. No. 135 of 1905.

The Court delivered the following

JUDGMENT :—The plaintiff sued as really entitled on a promissory note executed by the 2nd defendant in the name of the first. He also asked for relief against the 1st defendant for not having collected the money and paid it over. The Munsif made a decree against the 2nd defendant only for the suit amount. The Judge reversed the decree and dismissed the suit on appeal by him. The plaintiff preferred no appeal or memorandum of objections, nor does it appear that he asked the Judge to make a decree in his favour against the 1st defendant on the ground that he admitted having received the money. The plaintiff prefers this second appeal and claims a decree against the 1st defendant. The ruling in *Kulai Kada Pillai* v *Viswanatha Pillai*[1] is admittedly against the plaintiffs' contention that the Judge should have passed such a decree under the old Code. *Pup Janu Bibee* v. *Abdul Khadar Bhuyan*[4], *Iswardhari Singh* v. *Bibee Sahebzadi*[5] *Subramanian Chetty* v. *Veerabadran Chetty*[2] and *Kuppusami* v. *Vijiyanayanar*[3] were referred to. The first case was distinguished in *Kulai Kada Pillai* v. *Viswanadha Pillai*[1]. The second Calcutta case merely follows the first. The two Law Journal cases are distinguishable as not dealing with the present question The first of them simply deals with the question as to the competency of the Court to grant a lower relief not claimed by way of appeal when the higher relief granted to him by the original Court is refused on appeal. The second Law Journal case can be said only to express a possible view. No case has been cited in which it was held that the Judge was wrong in not passing a decree not asked for at all in any manner. We must, therefore, hold, following *Kulai Kada Pillai* v. *Viswnatha Pillai*[1], that the suit was rightly dismissed.

We dismiss the second appeal wth costs.

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1. (1904) I.L.R. 28 M. 229.
2. (1908) 18 M.L.J. 452.
3. (1908) 18 M.L.J. 586.
4. (1904) I.L.R. 31 C. 613,
5. (1908) I.L.R. 35 C. 538.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Kandasami Asari .. Appellant*

v.

Somaskanta Ela Nidhi, Limited, through its Secretaries (1) Chidambaram Chettiar, (2) Kristnasamy Aiyar .. Respondents.

Kandasami Asari v. Somaskanta Ela Nidhi.

Hindu Law—Joint family—Manager—Alienation by—Assent of other members when a cure—Subsequent ratification, effect of—Alienation whether void or voidable.

The manager of a joint Hindu family exercising the powers of a manager is not the agent of the family in the strict sense of the term. [*Annamala Chetty* v. *Murugesa Chetty*[1] referred to.] A manager can alienate joint family property for a family purpose or a justifiable family necessity. He can also alienate property with the assent of all the other members given at the time of the alienation, as such assent cures the incapacity of the manager, and it is not necessary, to validate the alienation, that the assenting members should join in the alienation.

But an alienation by the manager for no family purpose or necessity and made without the assent of the others is void and a subsequent ratification by the other members cannot validate it.

An assent by some alone, even at the time of the transfer, though evidence of the propriety of the alienation, will not, in the face of positive proof of its impropriety, suffice to pass their interests, for such assent does not pass their interest.

Obiter :—There can be no ratification where the agent does not purport to act on behalf of the principal.

Second appeal from the decree of the District Court of Tinnevelly in A. S. No. 384 of 1906, presented against the decree of the Court of the District Munsif of Tinnevelly in O. S. No. 255 of 1908.

The Advocate General (*P. S. Sivaswami Aiyar*) for appellant.

Dr. Swaminadhan and *K. Srinivasa Aiyangar* for respondents.

The Court delivered the following

JUDGMENT:—Ramasami Asari and the 8th defendant were brothers and members of an undivided Hindu family. Ramasami mortgaged the suit properties (which must now be taken on the findings of the Courts below to have belonged to the joint family) to the plaintiff Nidhi. It is found by the Munsif, and that finding was apparently not disputed in appeal, that the mortgage was not for a family purpose. The facts set out in paragraph 14 of the Munsif's judgment make it abundantly clear that there was no justifiable family necessity for the alienation.

* S. A. No. 215 of 1908. 16th February 1910.

1. (1903) I.L.R. 26 M. 544.

Kumaraswami Asari v Somaskanta Ela Nidhi.

The Munsif, however, found that the transaction was ratified by the 8th defendant and this conclusion has been accepted by the District Judge. It is argued on appeal that there could be no ratification of a transaction which was never entered into on behalf of the 8th defendant. This argument must be accepted as sound if Ramasami's alienation is rested on the footing of a contractual agency. The manager of a joint Hindu family exercising the powers of a manager is not the agent of the family in the strict sense of the term. See *Annamalai Chetty* v. *Murugesa Chetty*.[1] No ratification is possible where the agent does not purport to act, though without authority, on behalf of a principal. See *Keighley Maxted & Co.* v. *Durant*[2]. But the manager of a Hindu family has power to act for the family subject to certain restrictions. Alienations for a family purpose are within his competency. One mode of proving the family purpose, or justifiable family necessity as it has been called, is the assent of adult members of the family competent to contract. The family purpose may also be proved by showing the circumstances which have necessitated the alienation when those circumstances are within the purview of the rules of the Hindu Law on the subject. In this case the absence of the family necessity is distinctly found. In the face of such a finding the assent of co-parceners as evidence of such necessity cannot avail. But as the property vests in the undivided family, the manager with the assent of the other members may give a good title to the alienee even though the alienation is not for any family necessity.

It is not necessary that the assenting members should join in the transfer. The manager having the power to act by himself the assent of the other members cures his incapacity to act singly in certain matters or clothes him with the necessary capacity for the complete representation of the interests of the family. The assent in this case is not that of principals to the acts of an agent, but as Mr. MAYNE says, it is the supplying by the consent of the co-parceners the want of capacity on the part of the manager to alienate family property. "Such consent", he adds, "may either be express or implied from their conduct at or after the time of the transaction"—S. 345. It has been held by the Privy Council in the case of transactions by a Hindu widow that

1. (1903) I.L.R. 26 M. 544. 2. 1901 A.C. 240.

they are only voidable, not void, and that the reversioner succeeding to the estate may by his conduct ratify the transactions and give them full validity—*Modhu Sudan Singh* v. *Rooke*[1] and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2]. Is the act of the manager similarly voidable and not void where it is in excess of his powers limited to justifiable necessity? It has invariably been accepted as a sound canon of the Hindu Law that where the alienation is not justifiable necessity, it is void as regards the shares of the other members of the family and where such necessity exists it is valid in its entirety. See *Unni* v. *Kunchamma*[3]; *Sheo Shankar Gir* v. *Ram Shemak Chowdhri*[4] and *Balwantrao* v. *Ramakrishna*[5]. It has never been suggested that the alienation by the manager is only voidable where it is not for justifiable necessity. Taking it that there are two classes of alienations by the manager, some valid and others invalid, what is the true position of an alienation by the manager which is subsequently assented to by the remaining members of the joint family? An assent at the time of the alienation without taking part in it is, we have already said, sufficient to pass the property. An assent by some alone, though evidence of the propriety of an alienation, will not, in the face of positive proof of its impropriety, suffice to pass their interests, for such assent does not amount to a transfer. But where all the remaining members assent to the alienation subsequent to it, does it validate the alienation apart from any question of estoppel? The decision in *Musiligadu* v. *Nannigadu*[6], which was referred to, appears to rest upon estoppel of which there is no suggestion in this case. At page 493, the learned Judges who decided that case observe: "If, as a matter of fact, the defendants after their father's death assented to the possession of the land being taken by the donee on their non-payment of the rent and also assented to the plaintiff's joining after their mother's death in redeeming the land, they cannot now be permitted to contend that their father had no right to assign the land in the first instance." The question remains whether the subsequent assent of the remaining members of the family can validate the prior alienation by the manager. It

1. (1897) I.L.R. 25 C., p. 1.
2. (1906) I.L.R. 34 C. p. 329.
3. (1890) I.L.R. 14 M. 26 at. p. 28.
4. (1869) I.L.R. 24 C. 77, at p. 82.
5. (1902) 3 B. L.R. 682.
6. (1905) 15 M.L.J. 492.

Kandasami Asari v. Somaskanta Ela Nidhi.

has been held by the Privy Council that the subsequent assent of the presumptive reversioners can validate an alienation by a Hindu widow otherwise not justifiable. They say: "It is immaterial whether the concurrence of the reversioners was given at the time the alienation was made or it was given after the execution of the deeds of alienation—*Bajrangi Singh* v. *Manokarnika Baksh Singh*[1]. But this probably rests on the view that the alienations themselves are only voidable. If, on the other hand, a manager's alienation is void because it is not for justifiable necessity, it is difficult to see how the subsequent assent of the remaining members of the co-parcenery can validate an alienation void in its inception.

But in this case the District Judge says: "The District Munsif was certainly right in assuming that appellant knew of and probably also acquiesced in the transaction, especially as there was more than one isolated instance in which appellant took the receipts." If this means that there was a consent to the mortgage at the time of its execution, the appellant's interest is certainly bound. But if it means the same thing as the ratification, which the Judge speaks of subsequently, we think it is not sufficient to bind the 8th defendant.

We must ask the District Judge to find upon the evidence on record "whether the 8th defendant assented to the mortgage at the time of its execution." The finding should be submitted within six weeks, and seven days will be allowed for filing objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Medai Dalavin Tirumalai Appa Modeliar.. Plaintiff* (*Appellant*)

v.

Rama Subbier and others, Trustees of the Narasimhanathaswami Temple at Tiruppudaimaruthur .. Respondents (*Defendants* 1 *to* 3.)

Appa Mudaliar v. Rama Subbier.

Limitation Act, S. 10, Art. 12, 131—Suit for specific share of Tasdik—Suit by Katlai Manager against temple trustee—Relative positions of.

The plaintiffs, as managers of a katlai, sued the temple trustee for recovery of a specific share of the tasdik amount received by the latter from Government for

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*S. A. No. 444 of 1908 22nd February 1910.

1. (1907) I.L.R. 30 A. p. 1.

eleven odd yeais before suit, the same having been allotted for the purpose of the Katlai.

Held :—(1) That there was nothing in the case to support the view that the trustee acted as agent of the Kallalai manager in so receiving the amount.

(2) That it was reasonable to presume that the temple trustees were appointed trustees for the receipt of the kattalai amount.

(3) That S. 10 of the Limitation Act governed the case and not Article 62 or 131 and that arrears were recoverable for the whole period of eleven years odd.

Second appeal from the decree of the District Court of Tinnevelly in A. S. No. 5 of 1907 presented against the decree of the Court of the District Munsif of Ambasamudram in O. S. No. 273 of 1905.

The Advocate-General (*P. S. Sivaswami Aiyar*) for plaintiff-appellant.

K. Srinivasa Aiyangar for *S. Srinivasa Aiyar* for respondent.

The Advocate-General:—The question in this case is one of limitation. The general trustees of the temple receive a specific amount from the Government of which they have to pay a specific portion to the plaintiff who is also the trustee of a Kattalai in the temple. In respect of the money due to the Kattalai the general trustees are trustees for handing it over to the plaintiff. The course of conduct for a long time shows such trusteeship. S. 10 of the Limitation Act applies, and so there can be no plea of limitation. The lower Court is in error in saying that Art. 62 applies. [*Krishnaswami Aiyar* J.—How was this trust created ? Is not agency for the plaintiff more easy to presume ?] There is no proof of agency, express or implied. [*Krishnaswami Aiyar* J.—If Government was liable to pay a certain sum to the plaintiff, how could it create a trustee simply for receiving it and handing it over to the trustee of the Kattalai ? It is not illegal for it to do so ? Instead of presuming an illegal origin, why not presume agency which is not open to such objection?] Trust is presumable—GODEFROI on *Trust*, pp. 103 and 104; *Moore* v. *Darton*[1] where the language of a receipt given by a person was 'received for the use of' and the person was held to be a trustee. Art. 131 deals with suits to establish a periodically recurring right. As to the meaning of 'establish' as 'saying more than declared' see *Ratnamsari* v. *Aklandammal*[2] ; *Alubi* v.

1. (1851) 64 E.R. 938.　　2. (1902) I.L.R. 26 M. 291, 309 313, 314.

Appa Mudaliar v. Rama Subbier

Kurch-Bi[1]; *Rooji* v. *Bala*[2]; *Chhagan Lal* v. *Bapubhai*[3]; [*Krishnaswami Aiyar* J.—Is not a suit for arrears different from one to establish a right?]

K. Srinivasa Aiyangar.—There is no trust in this case. The plaint says that a certain sum out of the tasdik amount was allotted or assigned to the Kattalai. Therefore the Kattalai and the temple are co-sharers. [*Krishnaswami Aiyar* J.—If two separate and distinct sums are due to two persons from one and the same debtor, do the creditors become co-sharers?] Any how there is no proof of the creation of any trust. The conditions of S. 10 of Limitation Act have not been complied with.

The Court delivered the following

JUDGMENT.—The plaintiffs and defendants Nos. 4 to 6 are the managers of a Kattalai in a temple. Defendants Nos. 1 to 3 are the trustees of the temple. Since the days of Government management of the temple, a sum of $1\frac{1}{16}$ fanam per diem was being paid to the managers of the Kattalai for the performance of the Kattalai. From the time the defendants' predecessors were appointed trustees on the retirement of Government from management they and their successors received the amount from Government along with the other tasdik monies and paid it over to the managers of the Kattalai.

The present suit relates to arrears for 11 and odd years. The District Judge has held the claim barred except for the last three years before suit under Art. 62 of the Limitation Act.

We think the suit falls under S. 10 of the Limitation Act and no portion of the claim is therefore barred. It is found that the trustees of the temple have received the monies and paid them to the manager of the Kattalai for a period of fifty years or so. Did they receive the monies as agents of the plaintiff and defendants Nos. 4 to 6 or as trustees for them? There is no writing by means of which we can determine the question. If the defendants were only agents, it would be competent to the plaintiff and defendants Nos. 4 to 6 to determine the agency and claim the amount direct from Government. We do not think there is any foundation for this view. On the other hand, it is well

1. (1886) I.L.R. 10 M. 115. 2. (1890) I.L.R. 15 B. 135, 138.
3. (1880) I.L.R. 5 B. 68.

known that when Government withdrew from management of Hindu temples they appointed trustees of many temples and Kattalais. It is reasonable to presume that the defendants' predecessors were appointed not merely trustees of this temple but also for the receipt of the Kattalai due from Government. to be paid over to the managers of the Kattalai. In this view no question of limitation arises. We need, therefore, express no opinion on the question whether Art. 62 or Art. 131 would apply to the case, if S. 10 did not apply. We must set aside the decree of the District Judge and restore that of the Munsif substituting Rs. 624-3-6 for Rs. 854-8-0 and Rs. 312-1-9 for Rs. 427-4-0.

Appa Mudaliar v. Rama Subbie

The plaintiffs and defendants Nos. 1 to 3 will pay and receive proportionate costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Arakal Joseph Gabriel .. Appellant* (*Plaintiff*)

v.

Domingo Inas (died); his son Inas (minor) guardian and others Respondents (*Defendants and Legal Representatives of the deceased 1st Defendant.*)

Deed—Gift by Native Christians—Construction—Joint tenancy—Succession Act, S. 93, ill.—Applicability to gifts—T. P. A., S. 45—Applicability to gifts.

Gabriel v. Inas.

Where a Native Christian gifted away his property to his three children and two of the children died and the father afterwards mortgaged the properties to a stranger:

Held:—That the father's mortgage did not convey any title, he himself having no title to the properties.

(2) That the surviving child took his brother's interests by survivorship.

The principle of joint tenancy laid down in the illustration to S. 93 of the Succession Act is applicable to wills as well as to gifts

The difference in date as to the handing over of managements to the several donees is no ground for holding in favor of tenancy in common.

S. 45 of the Transfer of Property Act relates to transfers for consideration and does not apply to gifts. [*Naorojee Maneckji Wadia* v. *Pherozbai* [1] and 28 A. 38 dist.]

Second appeal from the decree of the District Court of South Malabar in A. S. No. 253 of 1907 presented against the

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* S. A. 1421 of 1907. 23rd February 1910.

1. (1897) I. L. R. 23 B. 80.

Gabriel v. Inas.

decree of the Subordinate Judge's Court of Cochin in O. S. No. 3 of 1906.

A. Krishnaswami Aiyar for *C. V. Ananthakrishna Aiyar* for plaintiff-appellant.

K. Govinda Marar for defendants-respondents.

Suit to enforce a mortgage. The mortgagor was the father of 3 minor children to whom he had made a gift of the properties. Subsequent to the gift two of the three children died. The father, after their death, mortgaged the properties to the plaintiff. The mortgagor and the three children were Native Christians. Both the lower Courts held that the father had no right to mortgage the properties, the surviving child having become entitled to them on the death of the others.

A. Krishnaswami Aiyar:—(1) Even assuming that the general rule is that a gift to *A* and *B simpliciter* creates a joint tenancy, the Court willbe astute in finding out some words of severance. The postponement of dates of handing over of the property to different dates is conclusive on the point. Exh. I provides that the father is to continue in possession of the properties as guardian of his minor children, and hand over the same as *each* child attains majority (which is the proper construction of the document, having regard to the use of the word "guardian"). Each joint tenant is entitled to be in possession of the entire property, and the provision as to handing over of the property on different occasions is inconsistent with joint tenancy.

(2) (*a*) S. 93 of the Succession Act has no application to the present case which deals with gifts *inter vivos*. (*b*) Again: it deals only with a case where the legatee dies before the testator. (*c*) The section does not enunciate any rule of construction. It simply states the effect of holding that a gift is to two persons as joint tenants. No rule of construction can be spelled out from the illustration. *Naoroji Maneckj Wadia* v *Pherozbai*[1] relied on by the other side, has no application. The will was executed within the limits of the Presidency. The parties admitted that they were governed by English law.

(3) It is submitted that the English Common Law rule will not be applied to the present case. The harshness

1. (1897) I.L.R. 23 B. 80.

Gabriel v. Inas.

of the rule was felt even in England, and the Courts of Equity looked upon joint tenancy with disfavour. English law as English law is not applicable to Native Christians. It is only applicable as a rule of justice, equity and good conscience.

(4) *S.* 45, *T. P. Act.* The rule enunciated in S. 45 with regard to transfers for consideration is in favour of tenancy in common. It applies to gifts as well.

K. Govinda Marar.—Naoroji Maneckji Wadia v. *Pherozbai*[1] is a direct authority on the point. The principle underlying S. 93 ought to be applied even to the case of gifts. 11 Cal., a case dealing with Hindus, is authority for the proposition that the rule that equity disfavours joint tenancy is of no force in this country.

A. Krishnaswami Aiyer in reply:—11 Cal. is not a case of gift. The question as to the presumption of status in a joint family is discussed therein.

The Court delivered the following

JUDGMENT:—The 1st defendant, a Native Christian, made a gift of property to his three children. Two of them died. The father mortgaged the property to the plaintiff. The question is, whether the father had any interest in the property. It is argued that on the death of the two children the father inherited their two-thirds share to the exclusion of the surviving brother under the Indian Succession Act. We are unable to agree with this contention. There are no words in the instrument of gift which indicate an intention to create tenancies in common. The rule of English law is to presume that the donees are joint tenants. This principle is adopted by the Indian Legislature in the Illustration to S. 93 of the Succession Act. The illustration, no doubt, deals with the case of a legacy. But the same principle is applicable to wills as to gifts unless there are special rules justifying a deviation. We must, therefore, regard the gift in this case as joint. It has been argued that Courts of Equity in England favour tenancies in common. But it has not been pointed out that in any English case upon a simple gift to *A*

1. (1897) I. L. R. 23 B. 80.

Gabriel v. Inas.

and *B*, a tenancy in common was presumed by the Court of Equity. It is next urged that the father retains possession as guardian till the children attain majority which must be on different dates, and that this indicates a severance of interest. But the vesting of the property is on the same date and the beneficial enjoyment of all commences at the same time. We cannot treat the difference in date as to the handing over of management as any ground for holding in favour of tenancy in common. No authority has been cited in support of this contention.

It is further argued that the English law ought not to be applied to this country. The decision in *Naoroji Maneckji Wadia* v. *Pherozebai* [1] was no doubt in a case which arose within the original jurisdiction of the High Court of Bombay. But we see no objection to the application of the English rule in a matter in which the Indian Legislature has shewn its leaning in its favor.

Our attention was drawn to S. 45 of the Transfer of Property Act. That relates to transfers for consideration. The principle of that section does not apply to gifts. The amount of consideration paid by each measures the interest in the property bought. Gifts stand on a different footing. We must, therefore, agree with the learned Judge in the Court below that the mortgage by the 1st defendant passed no interest to the plaintiff. We may point out that the decision in *Mankamna Kunwar* v. *Balkishna Das*,[2] in which the parties were Hindus, does not apply. We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Govindasawmi Thevan .. Appellant*

v. (*4th Defendant.*)

T. M. Doraisawmi Pillai and others .. Respondents.

Mortgage— Subrogation— Principles of — Covenant to discharge prior incumbrance—Discharge of puisne incumbrance as well—Rebuttal of presumption.

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* S A. 718 of 1908. 14th March 1910.

1. (1899) I. L. R. 23 B. 80.
2. (1905) I. L. R. 28 A. 38.

Govindasawmi Thevan v. Doraisawmi Pillai.

The principle of subrogation by payment to the prior incumbrancer rests upon the presumption of an intention to keep alive the first mortgage as a shield against the puisne incumbrance and the presumption is rebutted when the transaction in question contemplates the discharge of the puisne incumbrancer by payment out of the purchase money.

The rule as to subrogation only applies when the purchaser has not covenanted to discharge the previous incumbrance.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 141 of 1907 presented against the decree of the Subordinate Judge's Court of Tanjore in O. S. No. 38 of 1905.

G. S. Ramachandra Aiyar for appellant.

K. Srinivasa Aiyangar for respondents.

G. S. Ramachandra Aiyar relied upon *Gokul Das* v. *Purnamal*[1]; *Dinobundushaw Choudry* v. *Jogmaya Dasi*[2]; *Chama Swami* v. *Padala Ananda*[3]; *Vanmikalinga Mudali* v. *Chidambara*[4]; and distinguished *Renga Srinivasachari* v. *Gnanaprakasa*[5] on the ground that only a portion of the mortgaged property had been sold there, and the result of presuming the mortgage being kept alive would be to keep it alive as against lands not comprised in the sale deed. Where it is to the benefit of the person that discharges the incumbrance it must be presumed that it is kept alive.

K. Srinivsa Ayangar, for respondent, contended that "if the money be paid by one who has assumed the duty of paying the debt, either by a contract with the mortgagor or with those who may have succeeded to his rights; this must be taken as regards subsequent interests as payment" and there cannot be any question of subrogation—JONES, S. 858. To put it in another way: to the extent of the undischarged incumbrance here is duty on the part of the purchaser to indemnify the mortgagor—JONES, S. 751. And the subsequent mortgagee is by subrogation entitled to this indemnity, *i.e.*, the purchaser who pays off the prior mortgage is not entitled to claim to be subrogated to the right of he 1st mortgagee. This is the view taken in *Surgd Rammarmai* v. *Barham Dos Prasad*[6]; *Bisseswar Prasad* v. *Lalasaemam Singh*[7].

G. S. Ramachandra Aiyar replied.

1. (1888) I.L.R. 10 C. 1035.
2. (1901) I.L.R. 29 C. 154
3. (1908) I.L.R. 31 M. 439.
4. (1905) I.L.R. 29 M. 37.
5. (1906) I.L.R. 30 M. 67.
6. (1905) 2 C.L.J. 288 at 295.
7. (1907) 6 C.L.J. 34.

Govindasawmi Thevan v. Doraisawmi Pillai.

The Court delivered the following

JUDGMENT :—The question in this case relates to subrogation. Is the 4th defendant, the purchaser of items 1 to 26, entitled to stand in the shoes of Chengammal, the 1st mortgagee, against the plaintiff, the puisne incumbrancer? Chengammal had a mortgage on items 1 to 13. The 4th defendant agreed to pay off Chengammall's mortgage with part of the purchase-money, and it was so discharged. He also agreed to discharge the plaintiff's mortgage with the remainder of the purchase-money, but failed to do so. He contends that he is entitled on the principle of the decision in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* [1] to keep alive Chengammal's mortgage as it is for his benefit to do so. The District Judge, relying on *Srinivasachari* v. *Gnana Prakasa Mudaliar*, [2] has refused to uphold his contention. We may at once say that the decision in *Srinivasachari* v. *Gnana Prakasa Mudalliar* [2] has no application. There the first mortgagee had an incumbrance upon many items of properties of which a few were conveyed to the purchaser. It was held that the payment having released the remaining items from the incumbrance it was impossible to assume the subsistence of the first mortgage upon the items purchased to be used as a shield against the intermediate incumbrancer. The presumption in *Gokal Dass's case*[1] for the benefit of the subsequent purchaser (see p. 1,046) is rebutted when the intention to release the properties from the 1st charge is otherwise clear. In the present case it is clear on the facts that the intention to keep alive the first mortgage as against the puisne incumbrancer cannot be presumed as the object of the 4th defendant's transaction was not to keep alive a mortgage against the puisne incumbrancer but to discharge the puisne incumbrance as well. See JONES on *Mortgages*, S. 858. The question has been elaborately discussed by Justice *Mookerji* in *Surji Ram Marwari* v. *Barham Deo Prasad* [3] and that decision has been followed in *Bisseswar Prasad* v. *Lala Sarnam Singh*. [4] See also *Narayanasawmi Naidu* v. *Narayana Rau* [5]. The rule as to subrogation only applies when the purchaser has not covenanted

1. (1883) I.L.R. 10 C. 1035.
2. (1906) I.L.R. 30 M. 67.
3. (1905) 2 C. L. J. p. 288 at 298.
4. (1907) 6 C.L.J. p. 134.
5. (1893) I. L. R. 17 M. 62 at p 64.

to discharge the previous incumbrance. See SHELDON on *Subrogation*, S. 28. In the present case both the previous mortgages were arranged to be discharged by the purchaser and not merely the 1st mortgage. As the principle of subrogation by payment to the prior incumbrancer rests upon the presumption of an intention to keep alive the first mortgage as a shield against the puisne incumbrancer, we are safe in holding that that presumption is rebutted when the transaction in question contemplates the discharge of the puisne incumbrancer by payment out of the purchase-money. We must, therefore, dismiss the second appeal with costs.

Govindasawmi Thevan v. Doraisawmi Pillai.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Mathew Henry Abraham .. .. Appellant*
v. (*Plaintiff*)

The Lodge "Good Will" No. 465, Bellary, represented by D. W. G. Cowie, Senior Warden, and others .. .. Respondents
.. .. .. (*Defendants*).

Contract Act, S. 63—Scope of—Conditional release—Validity.

A release contingent on the happening of a future event is a good release; and S. 63 of the Contract Act is wide enough to cover conditional releases.

Difference between the English and Indian law pointed out.

A release of a claim which can after decree be enforced as against the assets of an institution, made conditional on the happening of a future event, is valid.

Abraham v Lodge "Good Will."

Appeal from the decree of the District Court of Bellary in O. S. No. 4 of 1908.

T. Richmond for appellant.

C. R. Tiruvenkata Chari for respondent.

The Court delivered the following

JUDGMENT:—*Abdur Rahim* J.—The learned District Judge has dismissed the suit brought by M. Henry Abraham as executor of Mathew Abraham for recovery of money due on a Promissory Note executed on the 12th November 1891 in the latter's favour by certain office-bearers of the Lodge "Good Will," No. 465 of Bellary, on the ground that though the document marked as Exhibit IV in the case and executed by Mathew

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*A. No. 218 of 1905. 8th March 1910.

Abraham v. Lodge "Good Will."

Abraham on the 21st February 1902 is not operative as a release, yet since the Lodge regarded it as such, being led so to regard it by the conduct of Mathew Abraham at the time of its execution, and completed the building of the Lodge premises on the faith of such belief, the plaintiff is estopped from enforcing his claim. No estoppel, however, was ever pleaded, and the issues did not raise the question, nor is there any evidence on the point except a statement of the last witness of the defendants elicited in the course of re-examination. The District Judge, therefore, was not right in dismissing the suit on that ground. The real question in the case is: 'Whether the District Judge is right in holding that Exhibit IV is not a good and effective release.' It is in these words:—

"Know all men by these presents that I, Mathew Abraham, proprietor of Messrs. Abraham & Company, Bellary, do covenant and agree with the Worshipful Master and Warden of Lodge Good Will, No. 465, for the time being, that if the Masonic Lodge building which has been burnt down is resuscitated, I shall have no claim, whatever, upon the building or any of the property of the said Masonic Lodge.

Signed, sealed and delivered by me this twenty first day of February one thousand nine hundred and two.

M. Abraham."

One reason why it is said it is not a good release is, that there is no mention of the promissory note there, and that neither at the time of its execution nor afterwards did Mr. Abraham have any claim upon the building or the property of the Lodge. There can be no doubt whatever—and this has not been disputed by the learned vakil for the plaintiff-appelllant—that the document refers lo the claim of Mr. Mathew Abraham under the Promissory Note as that was the only claim he had against the Lodge. It is true that until a decree was obtained on the note and executed, Mr. Abraham would have no charge upon the building of the Lodge or its property, but it is clear that the Promissory Note was intended to be satisfied out of the assets of the Lodge and not personally by those office-holders of the Lodge who executed it. In fact in the plaint itself judgment is prayed for against the assets and property of the Lodge.

The evidence on the point which is admissible under S. 95, Evidence Act, makes it quite plain that the claim referred to in Exhibit IV is with reference to the money due on the Promissory Note. The other question with reference to Exhibit IV is whether, its operation being made conditional on the happening of a future event, it comes within the provision of S. 63 of the Contract Act. The illustrations appended to the section are, no doubt, cases in which performance is dispensed with unconditionally. But the words of the section itself are wide enough to cover conditional releases, and there is no reason to think that the Indian legislature contemplated departure on this point from the English law under which a release contingent on the happening of a future event is a good release. The point on which S. 63 differs from the English law is that it does not require consideration to support a release while under the English law a release without consideration is a *nudum pactum* unless made by an instrument under seal—see *Davis* v. *Cundasawmi Mudali* [1]; *Manohar* v. *Thakur Das Naskar* [2]; *Naoroji N. Thoonthi* v. *Kazi Sidick Mirza.* [3] It has also been suggested that Exhibit IV is a new contract to release the debt and does not purport to be a release. But I do not think this is a sound contention. Mathew Abraham did not contemplate the doing of any further act on his part, the discharge of the liability was to come into operation as soon as the building was completed, and the building was in fact completed before the institution of the suit. And it can hardly make any difference whether a creditor says 'I release this debt' or 'I agree to release this debt'—and this, I think is to be gathered from the cases just cited and the English law on the subject of release, unless, perhaps, it was within the contemplation of the releasor that he was to do something more in order to carry out his intention. I am of opinion, therefore, that no question of consideration really arises in the case. If, however, Exhibit IV required consideration to support it I should be inclined to hold there was no consideration for it within the meaning of the Contract Act. There is no evidence, and it has not even been alleged, that Mathew Abraham ever requested the other

Abraham v. Lodge "Good Will."

1. (1896) I.L.R. 19 M. 398. 2. (1888) I.L.R. 15 C. 319.
3. (1896) I.L.R. 20 B. 636 at p. 644.

Abraham v. Lodge "Good Will."

members of the Lodge to rebuild the premises. What apparently happened was, the members of the Lodge decided upon rebuilding the Lodge premises, provided they had sufficient money for the purpose, and Mr. Abraham would release his claim upon the note. Mr. Abraham agreed to give up his claim in 1902. But that does not mean that Mr. Abraham desired them to rebuild the Lodge. However, as I hold that Exhibit IV was a valid release, I would dismiss this appeal with costs.

I may observe that as regards the form of the action it is not open to the defendants to rely on the objection on the score of an order under S. 30, C. P. C., not having been obtained, as the objection was not pressed before the District Judge.

Munro J:—I am of the same opinion and the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Ramasawmi Odayan .. Appellant*
v. (*Plaintiff*)
P. M. Ramasawmi Odayan and others .. Respondents
(*Defendants*).

Ramasawmi v. Ramasawmi.

Vakil—Right to terminate suit by oath of opponent—None, if not specially authorized.

A vakil, unless specially empowered, cannot bring a suit to a close by offering to be bound by the oath of the opposite party in a particular form. [*Sadashiv Rayaji* v. *Maruthi Vithal*[1] followed.]

Appeal from the order of the District Court of Tanjore in A.S. No 421 of 1907 presented against the decree of the Court of the District Munsif of Tanjore in O. S. No. 144 of 1906.

N. Rajagopalachari for appellant.

K. N. Aiya for respondent.

The Court delivered the following

JUDGMENT:—*Sadashiv Rayaji* v. *Maruthi Vithal*[1] is authority that a vakil, unless specially empowered, cannot bring a suit to a close by offering to be bound by the oath of the opposite party in a particular form, and we are prepared to follow that decision. It is not shewn in this case that the vakil was specially empowered. As to the evidence given by the plaintiff the District Judge has disbelieved it and we cannot interfere in second appeal. This appeal is dismissed with costs.

* C-M.A. 8 of 1909. 8th October 1909.

1. (1890) I.L.R. 14 B. 455.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(ORIGINAL CIVIL.)

Present:—Mr. Justice Wallis.

The Advocate-General of Madras. .. *Plaintiff**

v.

A.L.A.R. Arunachelam Chettiar .. *Defendant.*

Advocate-General of Madras v. Arunachelam Chettiar.

Wallis J.

C. P. C. (1882) *S.* 39—" *Civil Jurisdiction* ; " *meaning of—Jurisdiction of High Court over scheme' suit in moffusal temple—Statute, construction—Letters Patent—High Courts Act*, *S.* 9.

The words " civil jurisdiction " in S. 539 of the Civil Procedure Code of 1882 mean " Ordinary Original Civil Jurisdiction " and not " Appellate Civil Jurisdiction " ; and the High Court of Madras has no jurisdiction to try a suit for a scheme under S. 539, C. P. C., (1882) in respect of a temple in the mofussal (*e.g.*, Rameswaram).

Obiter .—The question is not merely one of jurisdiction but also one of private rights; and unambiguous words in the statute are necessary to take away private rights or to extend or curtail the jurisdiction of Courts like the High Court.

The presumption is generally against the extension of the original jurisdiction of the High Court.

The Letters Patent contemplate that all the provisions therein contained should be subject to alteration by the Indian Legislature and it would not be inconsistent with the Letters Patent for the Indian Legislature to confer upon the High Court original jurisdiction in a particular class of suits arising outside the limits of its ordinary original jurisdiction.

A provision by the Indian Legislature conferring such a power on the High Court will not be opposed to S. 9 of the High Courts Act.

The Advocate-general (*P. S. Sivaswami Aiyar*) *K. Srinivasa Aiyangar* and *P. R. Ganapathy Aiyar* for plaintiff.

T. Rangaramanuja Chariar, *S. Srinivasa Aiyangar* and *S. Doraisamy Aiyar* for defendant.

The Court delivered the following

JUDGMENT:—In this case the Advocate-General has instituted a suit under S. 539 of the Code of 1882 on the Original Side of this Court for the appointment of the trustees and the settlement of a scheme for the management of the Rameswaram Temple in the Madura District.

At the first hearing the case was adjourned to Chambers for the settlement of a scheme, but subsequently objection was taken by the defendant, the present Manager, that his Vakils had no authority to consent to the terms of the reference and also that the Court had no jurisdiction to try the suit. I decided to deal first with the question of jurisdiction, and it has been fully argued before me by the Advocate-General and Mr. S. Srinivasa Iyengar. Two contentions have been raised: that S. 539 does not confer upon the High Court in its Original Jurisdiction power to entertain suits in respect of charities in the mofussal, and that the Indian

* O. S. No. 367 of 1908, Dated 1st February 1910.

Advocate-General of Madras v. Arunachelam Chettiar.

Wallis J.

Legislature had no power to confer such jurisdiction on the High Court contrary to the limitations imposed by the Letters Patent on the High Court in the exercise of its Original Jurisdiction. It will be convenient to dispose of the latter contention first. As pointed out in *The Queen* v. *Burah*[1], under S. 22 of the Indian Councils Act, 1861, the Indian Legislature has power to legislate "for all Courts of Justice whatever," but cannot "repeal or in any way affect" the provisions of the Indian High Courts Act for the same year. It is pursuant to S. 9 of that Act that the Letters Patent of this and other Courts were issued; and the only question in my opinion is :—Is S. 539, as construed by the plaintiff, opposed to the provisions of S. 9 of the High Courts Act? The provisions of the section are as follows :—

"Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty, and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original or appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of the original civil and criminal jurisdiction beyond the limits of the Presidency Town as may be prescribed thereby;

And save as such by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matter aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise its jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of abolition of such last mentioned Courts."

The frame of the section which confers special power to limit the ordinary original civil jurisdiction of the High Courts by Letters Patent may be accounted for by the fact that it was intended, as mentioned in para 16 of the Secretary of State's Despatch accompanying the Letters Patent, to withhold from the new High Courts the jurisdiction which the Supreme Courts had exercised on the grounds of constructive inhabitancy or otherwise

1. (1878) L R, 5. I A. 178 : s.c, I.L.R 4 C. 172.

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over persons and property beyond the limits of the Presidency Town but within the limits of the Presidency."This object is effected by Clause 11 of our Letters Patent which confines the original civil jurisdiction of the High Court to such limits as may be declared and prescribed by any law made by the Governor in Council and until then in effect to the city of Madras. The power of altering the local limits of the ordinary original civil jurisdiction is reserved expressly by the Letters Patent to the local and not to the Indian Legislature, but Clause 11 and all the other clauses of the Letters Patent are by Clause 44 declared to be subject to the legislative power of the Indian Legislature so that it cannot be said that it would be inconsistent with the Letters Patent in the present form for the Indian Legislature to confer upon the High Court Original Jurisdiction in a particular class of suits arising outside the limits of the Ordinary Original Civil Jurisdiction as the Letters Patent contemplate that all the provisions therein contained should be subject to alteration by the Indian Legislature. This conclusion appears to me to dispose of the objection that such a provision would be opposed to S. 9 of the High Courts Act, because it has been held by their Lordships of the Judicial Committee in *The Queen* v. *Burah*[1] that on the true construction of the Indian Councils Act, 1881, and of the High Courts Act, 1861, unless there should be anything to the contrary in the Letters Patent under which the High Court is established, the exercise of jurisdiction in any part of his Majesty's Indian territories by the High Court was meant to be subject to and not exclusive of, the general legislative power of the Governor-General in Council as to "all Courts of Justice whatever"—page 190. And later on their Lordships after quoting the terms of the 8th section which is now in question observe : "The authority of the Indian Legislature over the jurisdiction of the High Courts (so far at all events as the exercise of that authority must be consistent with His Majesty's Letters Patent) is here distinctly recognised." This case appears to me to conclude the question, and I do not think it necessary to refer to the Indian cases which have been cited[2].

The next question is: Assuming that the Indian Legislature has power to give the High Courts Original Jurisdiction in suits

1. (1878) L.R. 5 I.A 178 : s.c. I.L.R. 4 C. 172.

2. See among others *Achaya* v. *Ratnavelu* (1885) I.L.R. 9 M. 253 :—Ed.

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as to charities arising outside the Presidency Towns, has it done so by S. 539? There are passages in the judgments in *Achayya* v. *Rathnavelu*[1] (sic[2]) and *Rangaswami Naicken* v. *Varadappa Naicken*[3] which show that the learned Judges who decided those cases read the section as conferring jurisdiction on the High Court, but the point did not arise for decision. There was no discussion about it, and the arguments urged before me to-day were not considered and these observations were only *obiter dicta* which are not binding on me. On the other hand, there are remarks in one of the judgments in *Ghazaffar Husain* v. *Yawar Husain*[4] which suggest that the learned Judge read the section the other way[5]. I have not been referred to any case in which the alleged concurrent jurisdiction of the High Court has been invoked, and the point appears to come up for decision for the first time.

Now the Ordinary Original Civil Jurisdiction of this Court is regulated by the Letters Patent as the Civil Jurisdiction of other Courts is regulated by the Civil Courts Act read with the Civil Procedure Code, and the Indian Legislature has been slow to interfere with the High Courts' Original Jurisdiction as settled by the Letters Patent. Thus in the provisions in the old Code regulating jurisdiction, Ss. 16, 17 and 19 are made inapplicable to the High Court, while S. 18 reproduces part of Clause 12 of the Letters Patent. So, too, when desirous of relieving the High Court of suits of small value, the Legislature has effected its purpose, not by taking away its jurisdiction to suits valued at upwards of Rs. 100, but by penalising parties resorting to jurisdiction as to costs—see the provisions of the Presidency Small Cause Court Act. Again, as already mentioned, Clause 11 of the Letters Patent of the Presidency High Courts expressly provides that the Ordinary Original Civil Jurisdiction shall not extend beyond the prescribed local limits of such jurisdiction, while the Letters Patent of the Allahabad High Court do not confer on it Ordinary Original Civil Jurisdiction at all. Further, the question is not one merely of jurisdiction but also of private right, because the prohibition in Clause 11 protects defendants in

1. (1885) I.L.R. 9 M. 253.
2. Evidently a mistake for *Subbayya* v. *Krishna* (1890) I.L.R. 14 M. 186 (200):—ED.
3. (1894) I.L.R. 17 M. 462 (467).
4. (1905) I.L.R. 28 A. 112.
5. But see *Jamal Uddin* v. *Mujhaba Husain* : (1903) I.L.R. 25 A. 631 (634):—ED.

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the mofussil from being brought here to answer suits except in the circumstances laid down in Clause 12; and it was the express policy of Parliament to restrain the Ordinary Original Jurisdiction of the High Court within the limits to be prescribed by the Letters Patent. In these circumstances, and assuming that the Indian Legislature has power to override these provisions, I think that in construing its enactments it is necessary to find clear and unambiguous words in order to extend the original jurisdiction of the High Court to a particular class of suits arising in the mofussil. According to well established principles, such words are necessary to take away private rights or to extend or to curtail the jurisdiction of the Court in the position of the High Court —see CRAIES' *Statute Law*, 4th Edition, page 109, and the authorities there cited. Having regard to the considerations already mentioned, I think the presumption against any intention to extend the Original Civil Jurisdiction of the High Courts is at least as strong as the presumption which arises in England against any intention to extend the jurisdiction of the Superior Courts, as to which see CRAIES, pages 116 and 117. Applying these principles to the construction of S. 539 we find that it empowers the Advocate-General, &c., to "institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate" and the question is: Do these words show a clear intention to extend the Ordinary Original Civil Jurisdiction of the High Court? In order that they may have that effect it is necessary to read the words "within the local limits of whose civil jurisdiction" as including the local limits of the Court's Appellate Civil Jurisdiction, whereas the section is providing to resort not to Appellate but Original Jurisdiction. The Advocate-General argues that the framers of the Code were familiar with the expression Ordinary Original Civil Jurisdiction and have used it in other sections and would have used it here if they have been referring to the local limits of its Original Jurisdiction. The expression would, however, be inapplicable as the words "civil jurisdiction" refer to the District Court as well as to the High Court, and the District Court has no Extraordinary Original Civil Jurisdiction as opposed to Ordinary Original Civil Jurisdiction. It would, of course, have been plainer if the words had been "Civil

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Jurisdiction," but, as already observed, the whole section is dealing with original jurisdiction ; and, on the other hand, if the limits of appellate jurisdiction had been intended, nothing would have been easier than to say so expressly. The Advocate-General also argues that if the limits of original jurisdiction are intended the mention of the High Court is superfluous because, having regard to the definition of the District Court in S. 2, the words District Court "would include the High Court in the exercise of the Ordinary Original Civil Jurisdiction." The definition in S. 2 only applies "unless there be something repugnant in the subject or context," and in cases like the present an interpretation clause must be applied with caution.—*Rex* v. *Cambridgeshire.*[1] Having regard to the fact that the section was intended to meet a difficulty which has been experienced in the mofussil and as in ordinary parlance District Court does not include High Court, the High Court may, I think, have been expressly mentioned to make it clear that the section was intended to apply to the Presidency Towns as well as the mofussil. On the whole I have come to the conclusion that the section does not in a sufficiently clear and unambiguous manner manifest the intention of the Indian Legislature to override the limitation imposed by the Letters Patent under the authority of Parliament on the exercise of Original Jurisdiction by the High Court beyond Presidency Towns. I may add that there is no obvious reason why in 1887 the Legislature should have been desirous of extending the Original Jurisdiction of the High Courts as regards this particular class of suits, and the fact that in the present Code any such extension of the High Courts' Original Jurisdiction is excluded in the clearest language certainly does not help the plaintiff. Lastly I may observe that on the interpretation contended for there would be considerable difficulty as to the extent of the power to sue conferred upon the Collector in the last para of the section, whereas on the other construction it presents no difficulty. For these reasons I am of opinion that the High Court has no jurisdiction. There is no allegation in the plaint bringing the suit within jurisdiction and the suit must be dismissed. There will be no order as to costs.

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1. (1837) 7 A & E 491.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Muthia Raja .. Appellant in both.*

v. (*2nd Defendant.*)

Appala Raja minor by his next friend Mangammal and another .. Respondents in both.

Muthia Raja v. Appala Raja.

T. P. A., S. 73—Substitution of securities—Mortgage of undivided share by co-parcener in Hindu undivided family prior to partition.

A mortgagee of an undivided share in the common property or of one of the joint properties before partition from one of the sharers is only entitled to proceed against the substituted property which falls to the share of the mortgagor at the partition unless the partition has been unfair or in fraud of the mortgagee. [*Lakshman* v. *Gopal*[1] distinguished.]

Second Appeals from the decrees of the Court of the Subordinate Judge of Tuticorin in A. S. Nos. 401 and 404 of 1906 presented against the decrees of the Court of the District Munsif of Srivalliputtur in O. S. No. 522 of 1908.

K. Bhashyam Aiyangar for appellant.

P. R. Ganapathy Aiyar for *S. Srinivasa Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—There is no ground for S. A. No. 411. It relates to the two-thirds share belonging to the plaintiff and his father. It must be dismissed with costs. S. A. No. 412 relates to the one-third share in the suit properties which was originally the share of the 1st defendant. The mortgage by the 1st defendant was before the partition. At the partition the whole of the suit properties fell to the plaintiff's share. It is not alleged that the partition was otherwise than fair and equal. It was not in fraud of the mortgagee. The authorities are clear that a mortgagee of an undivided share in common property or of one of the joint properties before partition from one of the sharers is only entitled to proceed against the substituted property which falls to the share of the mortgagor at the partition unless the partition has been unfair or is in fraud of the mortgagee. The principle is well explained in DOMAT'S *Civil Law*,

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* S. A. Nos. 411 and 412 of 1908. 7th March 1910.

1. (1896) I.L.R. 23 B. 385.

Muthia Raja v. Appala Raja.

S. 1671. In *Byjnath Lall* v. *Ramoodeen Chowdry*[1] the Privy Council has adopted the same principle though the partition in that case was made by the Revenue authorities under a Regulation and the Partition or Butwara proceedings had been started at the date of the mortgage and the mortgagee could not be a party to the proceedings under the Regulation.

But the broad principle above referred to has been applied in numerous cases. See *Hem Chunder Ghose* v. *Thakomoni Debi*[2]; *Amolakh Ram* v. *Chandan Singh* [3]; *Shahebzada Mahomed Kazim Shah* v. *R. S. Hills*[4], and *Hakim Lal* v. *Ram Lal*[5].

In the last case Mr. Justice *Mookherjee* has discussed and explained the rule at some length. We do not think that the decision in *Lakshman* v. *Gopal* [6] is opposed to it. In that case the partition was found to be in fraud of the mortgagee. It is pointed out by Mr. Justice *Ranade* that the mortgagee should have been made a party to the partition suit according to the practice in Bombay. The partition was therefore ordered to be reopened so as to assign to the mortgagor co-sharer the properties which had come to the plaintiffs at the partition. That decision fully recognises the authority of the Calcutta cases. We must, therefore, hold that the Subordinate Judge was right in decreeing possession to the plaintiff of the entire property.

We must dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Chettikulam Prasanna Venkatachella Reddiar .. .. Appellants*

v.

Chettikulam Kumara Venkatachella Reddiar .. .. Respondent.

Hindu Law — Impartible zemindari — Maintenance of junior member—Rate—Arrears—Decree, form of.

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*A. S. No. 27 of 1907. 3rd August 1909.

1. (1874) 1 I. A. 106.
2. (1893) I.L.R. 20 C. 533.
3. (1902) I.L.R. 24 A. 483.
4. (1907) I.L.R. 35 C. 388.
5. (1907) 6 C. L. J. 46.
6. (1898) I.L.R. 23 B. 385.

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Junior members of an impartible zemindary in Southern India both according to the practice prevailing in Southern India and the precedents of Courts, have a legal right to maintenance out of the Zemindary property.

Ordinarily, the only son of a junior member ought not to be allowed maintenance at the same rate as the father, especially where, as in the present case, the existing head of the family had junior sons of his own who will have to be maintained out of the estate.

Their Lordships allowed arrears due during plaintiff's minority at a rate less than the rate of maintenance allowed after plaintiff attained majority.

Held also that a compromise made in a suit brought by plaintiff's father for partition did not operate as a release of all claims on behalf of himself and his family for maintenance.

Appeal from the decree of the Subordinate Judge's Court of Trichinopoly in O. S. No. 1 of 1905.

The Advocate-General (P. S. Sivaswami Aiyar) and *T. M. Kristnaswami Aiyar* for *T. Subramania Aiyar* for appellant-defendant.

K. Srinivasa Aiyangar for *P. R. Sundara Aiyar* and *T. Natesa Aiyar* for plaintiff-respondent.

The Advocate-General:—The plaintiff in the case brought a suit for maintenance against my client the Zemindar. Plaintiff is the son of the deceased brother of the defendant. The suit has been decreed. My contentions are as follow :—

Firstly: The result of the recent Privy Council cases is that the Zemindar is the absolute owner of the Zemindari. The logical result of this is that the Zemindar is not bound to maintain any body—*Sartaj Kuari* v. *Deoraj Kuari*[1]; *Pittapore Case*[2]. There is no community of interest between him and others. Even before these recent cases there were decisions which denied any community of interest—*Nilkristo Deb* v. *Beerchunder Thakoor*[3]; *Thakoor Kupilanath* v. *The Government of Bengal*[4].

Secondly: Plaintiff's deceased father sued for partition and compromised the suit and got Rs. 300 a month. I submit that any claim that can be made by a branch can be made only once for all. What the father sued for and got must be deemed to be for the

1. (1888) I.L.R. 10 A. 272.
2. (1898) I.L.R. 22 M. 383.
3. (1869) 12 M.I.A. 523, 540.
4. (1874) 13 B.L.R. 445, 448.

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whole branch. [*Court.*—Does the compromise say that what the father got was to be in lieu of his share or in release of all his claims against the Zemindari ?]. Neither; but seeing that he brought a suit for partition it must be deemed to have been brought on behalf of the branch he represented.

Thirdly: There must be a limit to the sort of persons who could claim maintenance. In *The Pachete case*[1] it was held that none but the son of the last Zemindar is entitled to maintenance; otherwise the Zemindari will be swallowed up by continual demands from all the descendants of all the members of the Zemindari. In *Raja Yarlagaddu Mallikarjuna* v. *Raja Durga Prasada Rao*[2] the wording is " as younger brothers of the Zemindar they are entitled to maintenance. " In *Udayarpolliem case* [3] the point was not raised.

Fourthly: The rate of maintenance must be with reference to riches of the Zemindari, the relationship of the claimant, the existence of other maintenance holders. It is liable to fluctuations according to the income of the Zemindari. When the plaintiff's father got Rs. 300 there were no sons of the Zemindar while there are now three sons. Plaintiff is one degree more remote than his father. The rate may be Rs. 100, considering all this and the income of the Zemindari which is Rs. 3,000 a year. In *Lakshmipathi* v. *Kandasami*[4] for a brother Rs. 60 a month was allowed, the income being Rs. 15,000. In *Kachi Kalyana Rungappa* v. *Kachi Vijaya Rangappa*[3] Rs. 250 was allowed for the brother while the income of the Zemindari was Rs. 40,000. In *Mahesh Pratab Singh* v. *Dirgpal Singh*[5] the income of the Zemindari was Rs. 21,000 ; Rs. 50 was allowed.

Lastly: The Judge has allowed Rs. 31,000 as arrears at the same rate for the period from January 1897 up to 1904, the date of plaintiff attaining majority. I submit that no portion of this ought to have been allowed or at least only half of it, seeing that plaintiff was then only a minor and was not in need of the same rate of maintenance.

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1. (1879) I.L.R. 5 C. 256. 2. (1900) I.L.R. 24 M. 153 (P.C.)
3. (1905) I.L.R 28 M. 508 and (1901) I.L.R. 24 M. 562.
4. (1892) I.L.R. 16 M. 54. 5. (1899) I.L.R. 21 A. 232.

The Judges asking the respondent's vakil to argue only on the questions of rate and the arrears—

K. Srinivasa Aiyangar:—When the father got Rs. 300 a month the income of the Zemindari was Rs. 1,000 a month. Now it is Rs. 2,500 a month. My client's daughters have to be married; that was not the case when Rs. 300 was allowed to my father. I am not very remote; only a brother's son. The question is one of discretion.

As for arrears the expenses during minority did not differ in any way from those now. The respondent having refused to pay past arrears, I was obliged to borrow at a high rate.

The Court delivered the following

JUDGMENT:—We agree with the Subordinate Judge that Exh. V did not operate as a release by the plaintiff's father of all claims on behalf of himself and his family for maintenance. The learned Advocate-General then contended that in the case of an impartible Zemindari the junior members of the family have no legal right to maintenance, a conclusion which, he argues, follows logically from the recent decisions of the Privy Council as to the nature of an impartible Zemindari. We are not prepared to accept this contention which, we may observe, was given up in the Court below. In *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu* [1] their Lordships distinctly recognise the right to maintenance of the junior members of a *Raj* or other impartible estate. A similar claim was allowed without opposition in the *Udayarpalayam case*[2] and, so far as our knowledge extends, is in accordance with the usage prevailing in Southern India.

Then as to the rate awarded which is alleged to be excessive, Rs. 300 was the rate awarded to the plaintiff's father who was the brother of the then *Zemindar*. We think that ordinarily the only son of a junior member ought not to be allowed maintenance at the same rate as his father especially where, as in the present case, the existing head of the family had junior sons of his own who will have to be maintained out of the estate. And even taking into consideration the increased prosperity of the *Zamindari* at the present time, we think the rate

1. (1900) I.L.R. 24 M. 147 at p. 167. 2. (1905) I.L.R. 28 M. 508.

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of Rs. 300 awarded by the Subordinate Judge is excessive and should be reduced and that the proper rate is Rs. 250 a month. As regards arrears, however, we think the rate should only be Rs. 200 up to the 7th June 1907 when it is admitted the plaintiff attained the age of twenty-one. The decree will be modified accordingly. With these modifications, we confirm the decree and dismiss the appeal. Proportionate costs will be allowed in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Miller.

Mallapragadu and another .. Petitioners* (*3rd Respondent*)

v.

Lingam Veera Raghava Row and others .. Respondents (*Appellant*).

Mallapragadu v. Raghava Rao.

C. P C. (1882) *S.* 366 (*N. C.*, *O.* 22 *r.* 3, *sub. r* 1)—"*No such application*"—*Application made bona fide by wrong person.*

An application for bringing the legal representative of the deceased party is made within the meaning of S. 366, even though the party making the application is not the real legal representative, if he makes the application *bona fide*.

Application praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order that appeal No. 93 of 1904 presented against the decree of the District Court of Ganjam in O. S. No. 6 of 1903 has abated.

1st appellant, 2nd defendant, died on 9th July 1908. His vakil brought on record his father and brother as his legal representatives while the real legal representative was his mother as the property which the deceased claimed belonged to him solely and as under the Mitakshara Law the mother is the preferable heir.

T. Rangachari and *V. Ramesam* for respondents—took a preliminary objection that as the real legal representative was not brought on record the appeal ought to abate—*Mamraza* v. *Subharama Reddi* [1] and referred to Ss. 365, 368 and 582, C.P.C,

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*C.M.P. No. 1847 of 1909. 5th October 1909.

1. (1908) 19 M.L.J. 38.

[*Wallis* J.—What is there to prevent us from now bringing the real legal representative, as there is now a petition by the mother to be made a representative ?] As this last application is made now, *i.e.*, after the coming into force of the new Limitation Act, it is barred as it is now more than six months after the death. Mallapragadu v. Raghava Rao

K. Srinivasa Aiyangar and *P. Nagabhushanam* for appellant.—As there are two appellants in this case and only one of them died S. 363 applies, *vide* S. 582, and the Articles 175 A to 175 C of the Old Limitation Act do not apply. Under S. 363 I have got three years' time to apply. It has been so held. Simply because a wrong legal representative has been brought on the record the appeal does not abate. The petition in July 1909 was good under the old C.P.C. to enable me to prosecute the appeal under the old C.P.C. which, I submit, governs the case. Any body may be made the legal representative for prosecuting the suit or appeal—*Kadir Moideen* v. *Muthukrishna Aiyar* [1]; *Meenatchi Achi* v. *Anantanarayanan* [2]; *Balabai* v. *Ganesh*[3]. A right once accrued cannot be curtailed by a new Act-*Khusalbhai* v. *Kabhai.*[4] My application was *bona fide* and my new application also is *bona fide*. The Court has got power at any stage of the suit to add the right party.

T. Rangachari in reply quoted *Ghamandi Lal* v. *Amir Begam*[5]; *Musala Reddi* v. *Ramayya* [6]; and argued that *Kadir Moideen* v. *Muthukristnayyar*[1] itself distinguishes between the case of an appellant deceased and that of a respondent deceased on the ground of comparative difficulty in finding out the legal representatives.

The Court made the following

ORDER :—This is an application to the Court to declare this appeal abated so far as the 2nd defendant (appellant) is concerned on the ground that he died in July 1908 and that in September his father and brothers were brought on as his legal representatives, whereas his legal representative was his mother who has not been brought on. We are unable to accept this contention. The application appears to have been made *bona fide*

1. (1902) I.L.R. 26 M. 230.
2. (1902) I.L.R. 26 M. 224.
3. (1902) I.L.R. 27 B. 162.
4. (1881) I.L.R. 6 B. 26.
5. (1894) I.L.R. 16 A. 211.
6. (1899) I.L.R. 23 M. 125.

Mallapragadu v. Raghava Rau. by the 3rd defendant who was the father of the deceased 2nd defendant after consulting his vakil and was granted by the Court. In these circumstances we think it cannot be said that there was "no application made to the Court, within the meaning of S.366, Old Civil Procedure Code or Order 22, rule 3, Sub-rule (1) of the New Code, so as to cause the suit to abate. This was laid down by this Court in *Musal Reddi* v. *Ramayya*[1]. In that case some only of the legal representatives had been brought on the record instead of as here the wrong legal representatives, but this, we think, makes no difference. The observations of the learned Judges as to the hardships which would arise from the other construction are fully applicable to the case where a wrong legal representative has been brought on *bona fide*. This also appears to have been the view taken by this Court in *Kadir Mohideen Marakkayar* v. *Muthukristna Aiyar*[2]. See also *Balabai* v. *Ganesh*[3]. The petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Rosi *alias* Hegi and another .. Defendants* (*Petitioners*).

v.

Yadala Pillamma and another .. Respondents (*Plaintiffs.*)

Rosi v. Pillamma.

Evidence Act S. 33—Incomplete evidence of witness whose cross examination could not be finished.

Evidence taken in part of the deposition of a witness who died before his cross-examination was closed ought not ordinarily to be acted upon.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the judgment and decree of the District Court of Nellore in S. C. S. No. 2872 of 1907.

T. Ramachandra Rao for petitioners.

P. Ekambarayya for *K. Ramachandran* for respondents.

T. Ramachandra Rao:—The deposition of a witness whom the opposite party had no opportunity of cross-examining is

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* C.R.P. No. 725 of 1908. 8th December 1909.

1. (1899) I.L.R. 23 M. 125. 2. (1902) I.L.R. 26 M. 230 at p. 234.

3. (1902) I.L.R. 27 B. 162.

Rosi v. Pillamma.

inadmissible in evidence—WIGMORE on *Evidence*, Vol. II, p. 1742. In *Dunne* v. *English*[1], *Jessel* M. R. rejected an affidavit of a person who having departed from the country, the other side had no opportunity to cross-examine. Referred to S. 33, Evidence Act, as indicating the principle, *Meer Siyad Alikhan* v. *Lalla Kashinath Doss*[2] ; *Gorachand Sircar* v. *Ramnarain Chowdry*[3] ; *Regina* v. *Baswanti*[4], *Regina* v. *Ishri Singh*;[5] also *Boisagamoff* v. *The Nahapiat Fut colfd*[6]. TAYLOR, Vol. II, Art. 1469, at the first blush, appears to lay down the contrary rule. But the cases cited are all cases of affidavit which might stand on a different footing. It does not also appear in most of these cases that the opposite side had an opportunity of cross-examination, but did not avail himself of it, *e.g.*, *Davies* v. *Otty*.[7] Even if admissible, no weight is to be attached to it—*Abadam* v. *Abadam*[8]; *Morley* v. *Morley*.[9]

P. Ekambarayya—cited PHIPSON on *Evidence* p. 460, and the two cases referred to therein. He submitted that there was a distinction between the case where a witness could not be cross-examined owing to death, and where he could not be cross-examined owing to absence, &c. If a party is absent, steps ought to be taken to examine him. *Dunne* v. *English*[1] could be explained on the basis of this distinction.

The Court delivered the following

JUDGMENT:—The plaintiff was examined-in-chief. The cross-examination was not finished when the case was adjourned and he fell sick and became unable to appear again for cross-examination. There was an application for the issue of a commission to cross-examine him; but no commission was issued and the plaintiff died before the next hearing. There is no other evidence on record on the plaintiff's side to prove the pro-note sued on, except this incomplete examination of the plaintiff. It is contended before us that such evidence is wholly inadmissible and that the plaintiff's suit must, therefore, be dismissed. Without going so far as to hold that it is altogether inadmissible for

1. (1874) L. R. 18 Eq. 524.
2. (1866) 6 W.R. 181.
3. (1868) 9 W.R. 587.
4. (1900) I. L. R. 25 B. 68.
5. (1886) I.L.R. 8 A. 672 at 675.
6. (1901) 5 C.W.N. ccxxx.
7. (1865) 34 L. J. Ch. 252.
8. (1857) 24 Beav 243.
9. (1855) 5 Deg. M. & G, 610.

Rosi v. Pillamma.

any purpose, because the cross-examination was not completed (as to which see WIGMORE'S *Evidence*, Vol. II, p. 1742) we think it clear that the principle underlying S. 33 of the Evidence Act points to the conclusion that such evidence ought not ordinarily to be acted upon—*J. Boisagomoff* v. *The Nahapiet Jute Co., Ltd.*[1] But in the present case it may be that other evidence is available to prove the plaintiff's case, as there are attesting witnesses to the pronote.

We will, therefore, set aside the decree of the District Munsif and remand the suit for a fresh disposal according to law. Further evidence on both sides may be admitted. The costs in this Court will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

The Crown Prosecutor .. Appellant*

v.

G. Kothandaramiah .. Accused.

Crown Prosecutor v. Kothandaramiah.

Post Office Act, Ss. 64, 74, Cl. 2—V. P. order—Declaration—"Order" meaning of—Conduct of parties—Duty of addressee, of paper unordered—Statute—Construction—Bye-Laws.

According to the general canon of interpretation when a statute empowers the Government or any other authority to frame rules or bye-laws for the purpose of carrying out the objects of the statute, rules or by-laws so framed must, if within the scope of such powers, be regarded as part of the enactment.

Rule No. 68, Notification dated 5th August 1908, *Gazette of India*, Part I, August 1908, p. 747, requiring the sender of a V. P. article to make a declaration is a valid one and if the sender makes a false declaration or a declaration which he does not himself believe to be true, he makes himself liable to the penalty prescribed by S. 64.

Cl. 2 of S. 74 is obviously meat to meet cases for which no penalty is prescribed by any of the sections of the Act itself.

An order cannot be said to have been received by one person from another to send an article by post unless the latter is shown to have communicated a request or a desire to the former to that effect. The communication of the request need not perhaps be made by means of words written or spoken and may be inferred from the previous conduct of the addressee. There is no obligation on the part of the receiver of a paper not ordered by him either to return it or to reply to the sender's letters; and the receipt of the paper, though perhaps indicative of a willingness to pay on the part of the receiver cannot be construed as *an order* to send the article by V. P. for realization of the amount due within the meaning of the rule.

[*Ghulam Rabbini* v. *King Emperor*[2] distinguished.]

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* Cr. Ap. No. 486 of 1909. 10th January 1910.

1. (1901) 5 C.W.N. ccxxx.
2. (1909) 6 A. L. J. 481.

The Crown v. Kothandaramiah.

Appeal under S. 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Calendar Case No. 5538 of 1909 by the 2nd Presidency Magistrate, Georgetown.

The accused who is the manager of the *Police Service Magazine* sent 12 monthly issues of his magazine to P. W. 2 and after the 4th issue sent a slip with each issue that if the issues were accepted and retained, then the addressee would be treated as a subscriber. After the 12 issues which were all received, a post card was sent to the complainant, P. W. 2, that the 12 issues were received by him and that the 13th issue would be sent by V. P. as he had not refused them or paid for them. No reply was sent. The 13th issue was sent by V. P. with a declaration by the accused that the issue was sent in answer to a *bona fide* order. The Magistrate acquitted the accused of the charge of making a false declaration under S. 64 of the Post Office Act.

The Crown Prosecutor (*John Adam*) for the Crown.

P. R. Sundara Aiyar for accused.

John Adam (*Crown Prosecutor*) :—The finding is there was no order in the case in compliance with which the issues were sent. The Magistrate's view that the declaration in order that it may be penal must be one under the sections of the Post Offices Act and not under the rules is wrong; for the Act says that rules could be made by the Governor-General in Council and violations of the rules are equally punishable. *Gulam Rabbini* v. *King-Emperor*[1] referred to by the Magistrate to exculpate the accused on a consideration of the question of law does not apply as there was an order in that case. See also S. 72 Cl. (6) and S. 74 of the Post Offices Act.

P. R. Sundara Aiyar for accused :—There was an implied order from the conduct of the party. Even if there was no order the accused *bona fide* believed that he had an order. The declaration was not false to his belief. The Post Office Act does not require any such declaration as is made in the case. [*Rahim* J.—Was any *bona fide* order *received* within the meaning of the rule?] The accused thought he had. The penal section refers

1. (1909) 6 A.L.J. 481.

The Crown v. Kothandaramiah

only to declarations ordered to be made by the Act and not to those made under the Rules, *see* S. 64, 74 Cl. (2), and S. 35 of the Post offices Act. [*Benson* J.—No one is under an obligation to correspond or to refuse.] He need not retain the issues. From the retention an order may be inferred. [*Benson* J.—Look at S. 74 Cl. (3)]. S. 74 Cl. (2) explains S. 64 and they should be read together.] No rule has been made penalising a false declaration under the rules even. The rule made does not require a declaration to be made. It only says that if no declaration is made no article would be sent by Post Office by V. P.

The Court delivered the following

JUDGMENT:—The appeal is by the Crown against an order of the 2nd Presidency Magistrate acquitting Mr. G. Kothandaramiah, Manager of a journal called the *International Police Service Magazine* of a charge preferred against him under S. 64 of the Post Office Act. On the 29th October 1908 the accused sent a copy of the Magazine by value payable post to Mr. Webster, Superintendent of Police, Haldwani, signing a declaration to the effect that the article was sent in execution of a *bona fide* order received by him. Without such declaration being made the Post Office would not, by reason of a rule issued under the Act by the Governor-General in Council, have accepted the V. P. article for transmission to the addressee. Mr. Webster refused to receive the article on the ground that he never gave an order for it and moved for the prosecution of the sender for making a false declaration to the contrary in violation of the Post Offices Act. The Magistrate found on the evidence that the accused had received no order from Mr. Webster to send the V. P. article and therefore the declaration made by the accused was false. He, however, thought that the prosecution must fail because the Post Offices Act itself, that is the section in the body of the Act, does not require such declaration to be made and therefore the words of S. 64 which says " whoever being required by this Act to make a declaration, etc.," cannot sustain the charge because the rule framed by the Governor-General in Council is not part of the Act though properly framed under powers conferred upon the Act.

This view is obviously wrong. According to the general canon of interpretation, when a statute empowers the Government or

any other authority to frame rules or bye-laws for the purpose of carrying out the objects of the statute, rules or bye-laws so framed must, if within the scope of such powers, be regarded as part of the enactment. And in this case S. 74, Clause 3, of the Act expressly lays down that rules made under the Act shall have effect as if enacted by the Act. S. 35 gives power to the Governor-General in Council to make rules directing the Postal authorities not to receive a V. P. Article for transmission unless its sender makes a declaration that it is sent in execution of a *bona fide* order received by him and S. 74, Clause (1), gives him power generally to make rules for the purpose of carrying out the objects of the Act. The rule which the accused is said to have violated was made in pursuance of such powers. (See Rule No. 68 Notification dated the 5th of August 1908, *Gazette of India*, Part I, August 1908, page 747). But it is argued by Mr. Sundara Aiyar who appeared in support of the Magistrate's order that that is not "requiring" a declaration within the meaning of S. 64. It is somewhat difficult to appreciate the point of this argument. If it be that the Postal authorities cannot, by an order passed under the Act, compel a person to make any declaration on the pain, if he refuses to make the declaration, of his being guilty of the offence of disobeying a lawful order within the meaning of the Penal Code, that may be conceded. But that is not the question here. What is clearly required by the Act is that if a person wishes to utilize the service of the Post Office for sending a V. P. article and makes a declaration to obtain such services he shall make a true declaration. If he makes a false declaration, or a declaration which he does not believe himself to be true, he makes himself liable to the penalty prescribed by S. 64.

Another branch of Mr. Sundara Aiyar's argument, so far as we are able to follow it, is that Clauses 1 and 2 of S. 74 should be read together and reading them together, he contends that the general power to frame rules conferred by Cl. (1) must be confined to making such rules as are contemplated by Cl. (2) and not rules requiring a declaration within the contemplation of S. 64. But there is no reason whatever for cutting down in this manner the operation of the general words of Cl. (1) of S. 74. Cl. (2) of that section is obviously meant to meet

The Crown v. Kothandaramiah.

such cases for which no penalty is prescribed by any of the sections of the Act itself. Besides, as already pointed out S. 35 expressly authorises the Governor-General in Council to make such a rule as the one in question.

It has also been contended before us that upon the facts proved in the case we ought to hold that the declaration made by the accused was either a true declaration or one which he had reason to believe to be true. It is not suggested that Mr. Webster at any time by writing or by word of mouth gave order for the V. P. article or for any previous issue or issues of the magazine to be sent him. But it is urged that since he did not refuse to receive, nor returned by post any of the previous issues sent to him, and received intimation through slips attached to some of those issues and by means of postal cards, that he had been enrolled as a subscriber and that the issue in question would be sent to him as V. P. article and yet made no protest and in fact glanced at some of the numbers of the journal, it should be held that the accused had reason to infer that he had received an order from Mr. Webster to send the V. P. article. Now an order cannot be said to have been received by one person from another to send an article by post unless the latter is shown to have communicated a request or a desire to the former to that effect. The communication of such a request need not perhaps be made by means of words written or spoken and may be inferred from the previous conduct of the addressee. For instance if Mr. Webster had paid for the issue which was sent to him V. P. and continued to receive further issues of the magazine say for about a year and then an issue was sent to him V. P. for the amount of the subscription for that year it might well be that we could infer an order under such circumstances. But Mr. Webster, as his evidence shews, treated the numbers of the magazine which were delivered to him in the same manner as ordinary trade circulars and threw them away. It is true that he did not return the articles nor did he reply to any of the accused's postal cards, but there was no obligation on him to do either of these things. It may be that the accused interpreted Mr. Webster's silence as indicative of willingness on his part to pay for the numbers sent to him. But even if so, he could not reasonably have thought that he had received an order from

Mr. Webster to send the V. P. article. The case of *Gulam Rebbani* v. *King*[1] referred to by the Magistrate was a very different case. There, there was an order to send the articles in question insured for a certain amount and it was actually sent V. P. but uninsured for a somewhat larger amount. There can be no doubt in this case that the accused has offended against the Post Office regulations and we convict the accused under S. 64 of the Act. The learned Crown Prosecutor tells us that the object of the appeal is to obtain a ruling as to whether the Magistrate's view of the law is correct, and he does not press for a very heavy penalty. We sentence the accused to pay a fine of Rs. 10 (Rupees ten) or in default to 5 (five) days' simple imprisonment.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Munro.

Manickam Pillai .. Appellant *

v.

Audinarayana Pillai and others .. Respondents.

Deed—Construction—Partition deed—T. P. A., S. 100—Charge—General and specific language—Wide and indefinite language.

Two brothers had a partition made of their family properties. The partition deed, after providing that one of the brothers was to pay a certain debt, contained the following clause :—"If either of the parties should fail to observe the provision, the party in default shall pay to the other party who has sustained loss twice the amount from his properties."

Held, on a construction of the deed, that a charge was created on the properties. Distinction between wide language and indefinite language pointed out.

Appeal from the decree of the Subordinate Judge's Court of Negapatam in O. S. No. 4 of 1904.

Suit to enforce a charge created by a partition deed entered into between the plaintiff and the 1st defendant who were brothers. The clauses of the partition deed material for the purposes of this report are Cls. 3, 4 and 5. Cl. (3) says: " After deducting payments made * * * Rs. 3,200 is due to Muthusami Manickam Pillai; (plaintiff) Sambasivan Pillai (1st defendant) should pay and

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* A. S. No. 186 of 1905. 12th January 1910

1. (1909) 6 A.L.J. 481.

Manickam Pillai v. Audinarayana Pillai.

discharge his liability being half of this, *viz.*, Rs. 1,600. Besides this Rs. 1,600 being the half share due by Manickam Pillai should be paid discharged also by Sambasivan Pillai (Cl. 5.) If any of the sharers should fail to observe the provisions in paras 3 and 4, he shall pay to the other person who has sustained loss twice the amount from their properties.

Sambasivan Pillai failed to discharge the debt; and the creditor sued the plaintiff and obtained a decree. Plaintiff paid up the decree amount and brought a suit for the recovery of the decree amount paid by him—waiving his right to double compensation from the 1st defendant, on the responsibility of the properties that fell to the share of the 1st defendant The other defendants were impleaded as alienees from the 1st defendant. They contended that the plaintiff had no charge in respect of his amount under the partition deed. The Sub-Judge upheld their contention and hence the appeal by the plaintiff.

T. V. Seshagiri Aiyar.—A charge is created in law by the agreement to pay out of real estate. See S. 100 of T. P. Act for the definition of 'charge'; COOTE on *Mortgages*, Vol. I, p. 61; JONES on *Mortgages*, Vol. I, S. 166; *Burlinson* v. *Hall*[1]; *In re Count D' Epinnil, Tadman* v. *D' Epinnil* [2] a case where under similar circumstances a charge was held to have been created though there was no schedule of property; *Montagu* v. *Earl of Sandwich* [3]; *Kania Lal* v. *Muhammad Husain Khan* [4]; *Ramsidh Pande* v. *Balgobind* [5]; *Shadi Lal* v. *Thakur Das*[6]. [*Munro* J.—In the last two cases there were the words 'pledge' and 'mortgage'] Yes. The suit debt was originally incurred for paying off Government revenue which will ordinarily create a charge. I having paid that debt am entitled to a charge and that is why I am given a charge in the partition. *See The Collector of Etawah* v. *Beti Maharani*[7]; *Palaniappa* v. *Lakshmanan*[8]. *Bheri Dorayya* v. *Maddipatu Ramayya*[9] are distinguishable as there the promise was to pay in whosso ever's hands the property

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1. (1884) 12 Q. B. D. 347, 350.
2. (1882) 20 Ch. D. 758.
3. (1886) 32 Ch. D. 525, 538.
4. (1882) I.L.R. 5 A. 11.
5. (1886) I.L.R. 9 A. 158.
6. (1890) I.L.R. 12 A. 175.
7. (1892) I. L. R. 14 A. 162.
8. (1893) I. L. R. 16 M. 429.
9. (1881) I. L. R. 3 M. 35.

might be found. *Madho Misser* v. *Sidh Binaik Upadhya*[1] which is relied on by the lower Court is dissented from in this Court. If language is very wide we must give effect to it even though it is vague—*Tailby* v. *Official Receiver* [2]; GHOSE on *Mortgages*, pp. 228 to 231.

The Advocate-General.—Unless the document actually creates a charge Courts ought not easily to infer a charge, *Tailby* v. *Official Receiver* [2]. In *In re Count D'Epinenil Tadman* v. *D'Epinenil*[3] the word 'charge' was used. In *Burlinson* v. *Hall*[4] there was an assignment of the debt itself. In *Montagu* v. *Earl of Sandwich*[5] also the word 'charge' was used; Ghose p. 225; *Palaniappa* v. *Lashmanan*[6]. The words "pledge", "mortgage", or other similar words are essential where property is the general property of the debtor that is sought to be made liable. See Jones, Vol. I. p. 166. Mere "promise to pay out of property" does not create a charge, and *Bheri Dorayya* v. *Maddipatu Ramaya*[7], *Deojit* v. *Pitambar*[8], *Ramasidh Pande* v. *Balagoind*[9], *Shadi Lal* v. *Thakurdas*[10] consider the question of indefiniteness of language and not the aptness of words to create a charge. The words were "you will be at liberty to recover the whole of this money * * from my moveable and immoveable property." The words in *Madho Misser* v. *Sidh Vineyak Upadhya*[1], "shall buy from the property" simply state the natural consequence and do not create a charge. *Palaniappa* v. *Lakshmanan*[11] is distinguishable since there was a promise to pay out of a specific fund. In *Omrao Begum* v. *The Secretary of State for India* [12] their Lordships thought that a direction to pay out of the treasury is not sufficient to create a charge and this decision presents a close resemblance to the present case and must govern the decision.

T. V. Seshagiri Aiyar in reply distinguished the last as a case of mere direction to servants.

The Court delivered the following

JUDGMENTS:—*The Chief Justice*:—The question which arises for determination in this appeal is whether certain words

1. (1887) I.L.R. 14 C. 687.
2. (1888) 13 A.C. 543.
3. (1882) 20 Ch. D. 758.
4. (1884) 12 Q. B. D. 347, at 353.
5. (1886) 32 Ch. D. 525, 538.
6. (1881) I.L.R. 3 M. 36.
7. (1893) I. L. R. 16 M. 429.
8. (1876) I.L.R. 1 A. 275.
9. (1886) I. L. R 9 A 158.
10. (1890) I.L.R. 12 A. 175.
11. (1892) I. L. R. 16 M. 429.
12. (1892) I.L.R. 19 C. 584, 592 (P.C.)

Manickam Pillai v. Adinarayana Pillai. — Chief Justice.

in Cl. 5 of Ex. *A* create a charge within the meaning of S. 100 of the Transfer of Property Act. For the purpose of dealing with this question it is necessary to read the words which it is suggested create the charge by the light of the provisions of the deed as a whole. Now the deed in question is a partition deed entered into between two parties—One Sambasiva Pillai, who is the 1st defendant in the present suit and one Manickam Pillai, who is the plaintiff in the present suit.

The first clause provides that properties mentioned in Sch. *A* should be enjoyed by Sambasiva Pillai, and that properties mentioned in Sch. *B.* should be enjoyed by Manickam Pillai. Then clause No. 2 provides that as the value of the properties in Sch. *A.*, *i.e.*, Sambasiva Pillai's schedule, is more than that of the parties in Sch. *B.*, Manickam's schedule, a sum of Rs. 875 should be paid by Sambasiva Pillai to Manickam; and the same clause also provides that as Manickam has paid Government Kist due from Sambasiva Pillai, Sambasiva should pay a further sum of Rs. 725, making altogether Rs. 1,600. Then Cl. No. 3 refers to a debt incurred by the father of Sambasiva Pillai and Manickam Pillai for which the father had executed a pronote for, in round figures, Rs. 3,200. The deed provides that Sambasiva Pillai should pay and discharge his liability, that is half of Rs.3,200, *viz.*, Rs.1,600; and the deed further provides that besides this Rs. 1,600 the half share due by Manickam Pillai should be paid and discharged by Sambasiva Pillai who already had to pay Rs. 1,600 to Manickam Pillai as provided in Cl. No. 2.

There is no question that the effect of paragraph No. 3 is that Sambasiva Pillai made himself liable to pay in all Rs. 3,200.

Now we come to Cl. No. 5 which contains the words which the appellant contends create a charge. Cl. No. 5 is: "if either of the parties to the deed"—I only refer to so much of it as is material—"if either of the parties to the deed should fail to observe the provisions in paragraphs No. 3 and 4, he, that is the party in default, shall pay to the other party who has sustained loss twice the amount from their properties.

No question arises in regard to twice the amount as the plaintiff only claims to be indemnified on the ground that he had to pay by preason of the party in default having failed to

discharge the liability which he incurred under the provisions of Cl. No. 3 of the deed.

The words which are relied on as creating a charge are "pay * * the amount from their properties." And the first question which arises for consideration is, what is the meaning of the words "their properties" occurring in Cl. No. 5. It seems perfectly clear to me that the underlying idea of this deed of partition between these two parties was equality of division and that any inequality which arose from a difference in the value of the properties comprised in the two schedules or from the fact that payments had been made by one of the parties for which the other party was liable or for which both parties were liable—that these inequalities should be adjusted by payment from one party to the other, so that the final result would be that there should be under the partition deed equality of division. Therefore it seems to me in reading the words in Cl. No. 5 by the light of the general provisions of the deed and bearing in mind the fundamental idea of the deed, namely, equality of division, that the word "properties" which occurs in Cl. No. is to be construed as meaning properties referred to in Sch. *A* or in Sch. *B* as the case may be.

The Advocate-General has pointed out that whenever it is intended to refer to the properties in the schedules in the other clauses of the deed there is an express reference to the schedules. That is true enough. But then without a reference to the schedules in the other clauses in the deed, it would be impossible to express the intention of the parties intelligibly. No such necessity arises in regard to Cl. No. 5 and I am certainly not prepared to say that the word 'properties' in Cl. No. 5 is used in a different sense from that in which it is used whereverelse it occurs in the deed. Now that being, in my view, the construction of the word "properties," I do not feel much difficulty in dealing with the cases which have been cited by the Advocate-General. The only case to which I need refer is that of *Bheri Dorayya* v. *Maddipatu Ramayya*[1], which I think is the strongest case in support of the Advocate-General's contention, because it contains language which is very similar to the language in the present deed.

1. (1881) I. L. R. 3 M. 35.

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Munro J.

There it was held that a promise to pay out of the debtor's property indefinitely did not create a charge. If I took the view that the word "properties" in the deed in question in the present case referred to the "debtor's property" generally, one would have to consider how far one would be prepared to follow this case, *Bheri Dorayya* v. *Maddipatu Ramayya*[1], in view of some of the later decisions and in view of the law which has been laid down in some of the text books to which our attention has been called. But, as it seems to me, the word "properties" means in the present case the properties in the schedules, I think the language is specific and not general. Of course, even if it were general, it does not follow that a charge is not created by reason of the fact that the language is general, because, as is pointed out by Mr. Ghose in the passage in his work which the Subordinate Judge himself has cited, a distinction has been drawn between wideness of language and vagueness or indefiniteness of language. The passage is set out in paragraph No. 32 of his judgment: "The truth is indefiniteness is frequently confounded with what has been called wideness, it being forgotten that the subject-matter of the contract may be wide and yet definite, while on the other hand it may be narrow and yet indefinite." The proper construction of the words in my view being what I have indicated, I hold that the words are sufficiently apt to create a charge. Therefore I must dissent from the Judge in this case. His decree must be set aside and the case must be sent back to him to be disposed of according to law. Costs will abide the event.

Munro, J:—I am of the same opinion.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sankaran Nair.

Reyelle Jogayya .. .. .. Appellant* in S. A. 1399 of 1907* (*Plaintiff.*)

v.

Nimma Shekai Venkataratnamma and another .. .. Respondents. (*Defendants* 2 and 3.).

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*S. A. Nos. 1399 and 1400 of 1907. 5th January 1910.

1. (1881) I.L.R. 3 M. 35.

Hindu Law—Widow—Debts incurred by—Binding character of.

Reyelle Jogayya v. Venkataratnamma.

It is not necessary that a Hindu widow should create a charge on the estate in respect of a debt incurred by her for necessary purposes binding on the estate in order that the debt may be binding on the estate. It is enough if the creditor lends to her as representative of the estate for a necessary purpose binding on the estate.

[*Ramasami* v *Sellathammal*[1] commented on.]

Second appeal from the decrees of the District Court of Godavari in A. S. Nos. 53 and 54 of 1906 presented against the decrees of the Courts of the District Munsif, Amalapur, in O. S. Nos. 56 and 85 of 1905.

The suit was upon a pro-note executed by the 1st defendant, a Hindu widow, in favour of the plaintiff to recover the amount from the 1st defendant personally and from all the properties in her possession. The 1st defendant died pending the suit, and defendants 2 and 3, her daughters, were brought on record as legal representatives of the deceased 1st defendant. An issue " whether the plaint note is binding on the estate of the 1st defendant's husband" was framed as an additional issue after these defendants were brought on record. The plaintiffs in these suits alleged that the debts were contracted for such necessary purposes as would entitle the widow to alienate the properties of her husband, partly for the improvement of the husband's estate and partly for the payment of a debt due from the husband. The Munsif dismissed the suit as against the estate on the ground that the widow was sued only in her personal capacity. On appeal the District Judge confirmed the judgment of the District Munsif on the ground that the 1st defendant did not create a charge on the estate of her deceased husband and that on the other hand, it was clear from the pro-note itself, that she made herself only personally liable.

T. V. Seshagiri Aiyar for appellants.

P. Narayana Murthi for respondents.

T. V. Seshagiri Aiyar relied upon *SakraBai* v. *Majan Lal*[2] *Hurry Moheen Rai* v. *Gonesh*[3] and SARKAR p. 405 for the position that the estate is liable notwithstanding that no charge is created provided the debt is incurred for a purpose binding on the reversioners and the creditor did not intend to give up his remedies against the estate.

P. Narayanamurthi relied upon *Shiamanand* v. *Harlal*[4];

1. (1882) I.L.R. 4 M. 375.
2. (1901) I.L.R. 26 B. 206 at 215.
3. (1884) I.L.R. 10 C. 823.
4. (1896) I.L.R. 18 A. 471.

Reyelle Jogayya v. Venkataratnamma.

Dhizaj Singh v. *Manga Rau*[1]; *Kallu* v. *Fiaz Ali Khan*[2]; *Gangappa Desai* v. *Appaji Jivan Rao.*[3] These cases, he contended, made it clear that in the absence of a charge the debt would not bind the estate also—MAYNE (7th Ed.) p. 855. At any rate he submitted in this case, the taking of a pro-note amounted to an election by the creditor to a remedy against the widow personally.

The Court delivered the following

JUDGMENT:—In *Ramasawmi Mudaliar* v. *Sellathammal*,[4] the case by which the District Judge holds himself bound, *Innes* J. no doubt held that the reversioners will not be bound to pay a debt contracted by the widow unless the debt is charged on the estate. *Kindersley* J., however, took a different view, holding that the plaint did not allege clearly that the promissory-note was made by the widow as representative of the estate and did not allege such a state of facts as would, by operation of Hindu law, render the debt due on the promissory-note binding on the reversioners.

Neither *Kindersley* J. nor *Turner* C. J. who rejected the plaint in the Original Court takes the view that, as a matter of law, the reversioners cannot be bound unless the debt is formally made a charge on the estate, and there is no other authority in this Court for that view except the opinion of *Innes* J.

In our opinion, no distinction can be properly drawn between the case where a charge is formally created and the case in which the creditor lends for the necessary purposes of the estate to the widow as representative of the estate. In such a case though there is no formal charge upon the property forming the estate, the debt is a debt due by the representatives of the estate and recoverable from them. This seems to be the view of *Turner* C. J. and *Kindersley* J.

In the case before us the question whether the debts were borrowed by the widow as representative of the estate and for purposes binding on the reversioners, and the question whether the creditor looked only to the personal credit of the widow or

1. (1897) I.L.R. 19 A. 300.
2. (1908) I.L.R. 30 A. 394.
3. (1879) I.L.R. 3 B. 237.
4. (1882) I.L.R. 4 M. 5.

lent to her as representative of the estate on the credit of the estate, have not been decided.

Reyelle Jogayya v. Venkataratnamma.

We accordingly reverse the decree of the District Judge and remand the case for decision according to law in accordance with the above observations. Costs will abide the result.

It will be open to the District Judge to remand the case to the Court of first instance or take evidence himself as he deems necessary.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sankaran Nair.

Mayan Thariyakath Kathijakutti Umma and another .. .. .. Appellants*

v.

Ithikamparambil Kuthussa and others .. Respondents.

Kathijakutti Umma v. Kuthussa.

Landlord and tenant—Ejectment suit—Plea of want of notice to quit—Denial of landlord's title in written statement, when entails a forfeiture of right to notice.

In a suit in ejectment, the defendants pleaded want of notice to quit and also title in themselves by reason of their purchase before suit from a third person to whom they alleged the lands belonged in jenm right.

Held:—That the allegation in the written statement of the purchase before suit was evidence of the purchase before suit as well as of a denial of title before suit; and, consequently, the plea of want of notice to quit was not valid.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 768 of 1906, presented against the decree of the Court of the District Munsiff of Ponnani in O. S. No. 397 of 1905.

Suit in ejectment. The plaintiff was the landlord and the defendants tenants from year to year of the lands in suit. The lower appellate Court dismissed the suit on the ground of want of notice to quit. Plaintiff preferred this second appeal.

The defendants, after denying in para 8 of the written statement that the suit was not sustainable on the ground of want of notice to quit, proceeded in para 12 of the written statement to state that the lands sued for did not belong to the plaintiff but to a third person in jenm right from whom they purchased the same in 1897.

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* S. A. No. 1357 of 1907. 4th February 1910.

Kathijakutti Umma v Kuthussa.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellants.

C. V. Anantakrishna Aiyar for respondents.

T. R. Ramachandra Aiyar.—The defendants, having denied in their written statement the title of the plaintiff and having set up title in a third person and alleged that they purchased the same some years before suit, have disentitled themselves to notice to quit—*Dœ dem Mee* v. *Litherland* [1]; *Dœ Dem Grubb* v. *Grubb* [2]; *Pratap Narain* v. *Harihar Singh*[3].

C. V. Anantakrishna Aiyar.—The denial of title in the written statement is not sufficient. There must be a forfeiture in order that notice may be dispensed with, and for a forfeiture it is necessary that (1) there must be a denial and (2) some act on the part of the landlord evincing his intention to take advantage of the tenant's denial—S. 111 of T. P. Act; *Venkatarama Bhatta* v. *Gundaraya* [4]; *Anandamoyee* v. *Lakhi Chandra Mitra* [5].

The Court delivered the following

JUDGMENT:—The plaintiffs alleged that they had given notice to the defendants to quit, but it has been found that none was given. The defendants alleged that the plaintiffs had no title to the land; that they (the defendants) were not in occupancy as their tenants but as jenmis by virtue of a purchase from the former jenmi. The tenancy alleged or found is a tenancy from year to year, terminable by a notice to quit, and this fact distinguishes the present case from *Anandamoyee* v. *Lakhi Chandra Mitra*[5], and *Venkatramana Bhatta* v. *Gundaraya*[4], where the tenancy was, in both cases, of a kind determinable only by forfeiture or efflux of time. In the case of a tenancy terminable by a notice to quit, the tenant, by denying the landlord's title before the suit, forfeits or is held to waive his right to the notice—*Unhamma Devi* v. *Vaikunta Hegde*[6]—and when the tenant alleges facts which by necessary implication involve a denial of the landlord's title, this is a waiver of the right to notice (same case). Here

1. (1836) 4 A & E. 784.
2. (1830) 10 B. &. C. 816
3. (1909) I. L. R. 36 C. 927 at 932.
4. (1908) I. L. R. 31 M. 403.
5. (1906) I.L.R. 33 C. 339.
6. (1893) I.L.R, 17 M. 218.

Kathijakutti Umma v Kuthussa.

the defendants by alleging that they held as jenmi under a title derived from a person other than the plaintiffs, clearly alleged facts inconsistent with their holding as the plaintiff's tenants and clearly therefore denied the plaintiff's title. And their allegation in the written statement of the purchase before the suit is evidence of the purchase before suit, and that purchase from the vendor as jenmis being necessarily inconsistent with the plaintiff's title as landlord, the allegation is evidence also of a denial of title before suit—vide *Doe dem Mee* v. *Litherland*[1], and *Doe Dem Grubb* v. *Grubb*[2]. The defendants, therefore, are not entitled to any notice to quit.

The decree of the lower appellate Court is reversed and this appeal remanded for disposal on the merits. The costs of this second appeal will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Munro.

Kshetrabaro Bissoyi of Namanagaram .. Plaintiff*
(*in appeals* 134 *and* 135 *of* 1905)

v.

Sobhanapuram Harikristna Naidoo ..
Respondents
and others (*in appeal No.* 134 *of* 1905)

Sobhanapuram Gopinatha Naidu
and others .. .. .. Respondents
(*in appeal No.* 135 *of* 1905).

Madras Acts—Act III of 1895, *S.* 5—"*Transfer*", *meaning of—Permanent lease of service inam lands, validity of.*

Kshetrabaro v. Harikristna.

The grant of a permanent lease is not a transfer of proprietary right or ownership ; and, consequently, the grant of a permanent lease of service inam lands is not invalid, not being a "transfer" within the meaning of S. 5 of Madras Act III of 1895.

Appeals from the decree of the Agent to the Governor in Ganjam in O. S. Nos. 2 and 3 of 1904.

The plaintiff in these two cases is a Bissoye in Parlakimedi in the Ganjam District. The plaintiff gave two permanent leases at a fixed rent to the defendants in the two cases, one in 1891 and another in 1899. The suits are brought for annulling the

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* A. Nos. 134 and 135 of 1905. 1st December 1909.

1. (1836) 4 A. and E. 784. 2. (1830) 10 B. and C. 816.

Kshetrabaro v. Harikristna.

leases on the ground that the lands leased were given to him (the plaintiff) on service tenure and that they were not therefore capable of being transferred or encumbered. The defence in both cases was that the leases were valid in every way, having been given for a proper rent and that too, for bringing into cultivation jungle tracts. The Agent to the Governor held that the leases came under S. 5 of Madras Act III of 1895 and that the lease, being favourable to the landlord in its terms, was not liable to be cancelled.

T. V. Narayaniah for appellant (plaintiff.)

P. R. Sundara Aiyar, *N. Rajgopalachari* and *H. Sitaramaswami* for the respondents.

T. V. Narayaniah.—A lease is a transfer or alienation, especially a permanent lease at a fixed rent. The landlord precludes himself from raising the rent. The Bissoye holds the lands on service tenure. He has no proprietary interest in them—see *Goura Chandra* v. *Secretary of State for India*[1]. S. 5 of Madras Act III of 1895 applies. There is a prohibition against creating a 'transfer' or 'encumbrance' in that section—*Manavikraman* v. *Sundaran Pattar* [2]and S. A. 865 of 1901. Even if the Act does not apply, public policy prohibits an alienation of service tenures. There could be no estoppel against the transferor in such a case—*Maharaja of Vizianagaram* v. *Chelliah*[3], a case dealing with an alienation, coming under S. 5 of the Act. No question of improvements could arise in the case as the defendant had received all his dues long ago. The Act must apply and affect the Case after it came into force. No notice will be necessary as the lease is a void one.

P. R. Sundara Aiyar.—No notice has been given in either of these. Even under a void lease, if rent has been received a tenancy from year to year is created and notice is necessary—*The President and Governors of Magdalene Hospital* v. *Knolts*[4]. There is no proof that these lands are now held on service tenure. The Bissoyes were dissociated from the Zamindari, and were directed to hold directly under the Government. Formerly there were service *tenures Goura Chandras Case*[1]. It is not

1. (1905) I.L.R. 28 M. 130, 144. (P. C.)
2. (1881) I.L. R. 4 M. 148.
3. (1904) I. L.R. 28 M. 88.
4. (1879) 4 P. C. 324.

Kshetra Bisso v. Harikris Naido

known whether the lands are still emoluments. 'Transfer' in S. 5 is a transfer of ownership and not settlement of rent. S. 6 of the Estates Land Act applies to these cases and the defendants would be entitled to permanent occupancy rights—S. A. 1158 of 1906, which refers to similar Bengal cases. The word 'transfer' has been held not to include a permanent lease; *Venkateswara Yettiapah Naicker* v. *Alagoo Mootoo*[1]. 'Transfer' in S. 8 of Regulation XXV of 1802 means, in conjunction with the words 'sale' and gift,' transfer other than sale or gift, and permanent leases cannot be affected as was held in the above case. *Kondappa Naik* v *Annamalay Chetty*[2] shows that it is not void as between the transferor and transferee. This is like a transfer of watan or ghatwali property—*Tekaith Ramchunder* v. *Srimati Madho Kumary*[3]; *Radhabhai* v. *Anantarao*[4]. If it is a case of trust property where the transferor has no beneficial interest, the lease will be good only for the life of the transferor—*Abhiram Goswami* v, *Shyama Charan*[5]. As for the first case where the lease was made in 1871 the suit will be barred by limitation, the suit having been filed in 1904. A right to a permanent lease could be acquired by prescription even if the lease is void—*K. Subbayya* v. *K. Mudduletiah*[6]. The Act of 1895 cannot be retrospective and cannot take away vested rights—*Muhammad Abdussamad* v. *Qurban Husain*[7]; *Balraj Kunwar* v. *Jagatpat Singh*[8]. In a case of holding over, a fixed tenancy from year to year is created which can be put an end to only on proper notice to quit—S. A. 640 of 1907. As to estoppel, *Maharaja of Vizanagaram* v. *Chelliah*[9] deals only with a Court sale of emoluments under S. 5 of Act III of 1895 as the sale will deprive the owner or his successor of the emoluments. Permanent lease is only one made of enjoying property. As for improvements, S. 51 of the Transfer of Property Act or its principle would be applicable. Except for the statutory prohibition there is none other arising from public policy.

T. V. Narayaniah in reply.—The fact that this is a mere service inam has not been disputed in the lower Court. There could be no adverse possession as rent was being paid.

1. (1861) 8. M. I.A. 327, 338
2. (1869) 4 M. H. C. R. 396.
3. (1885) I.L.R. 12 C. 448. (P. C.)
4. (1886) I. L. R. 9 B. 198. (F.B).
5. (1909) I. L. R. 36. C. 1003 (P.C.)
6. (1907) 17 M. L. J. 469.
7. (1903) I. L.R. 26 A. 119,129.
8. (1904) I. L. R 26 A. 393.
9. (1904) I L. R. 28 M. 84.

Shetrabaro Bissoyi v. Harikristna Naidoo.

The Court delivered the following

JUDGMENT.—The plaintiff in both the suits out of which these appeals arise is the Bissoyi of Namanagaram. He in 1891 and 1899 granted two leases of certain land at rates of rent ordinary and reasonable in amount but permanently fixed. In 1904 he sued to set the leases aside and to recover possession of the lands on the ground that the leases were invalid inasmuch as the lands were service inam lands. The suits were dismissed and the plaintiff appeals. Under S. 5 of Madras Act III of 1895 the emoluments attached by the state to certain offices "shall not be liable to be transferred or encumbered." The contention on behalf of the appellant is that the lands in suit are such emoluments and that the grant of a permanent lease amounts to a transfer within the meaning of the section. We shall assume for the sake of argument that the section applies to the lands in suit. The question then is what is the nature of the disposition which is prohibited by the words "shall not be liable to be transferred." It is conceded that it is lawful for the plaintiff to lease out the lands in the ordinary way. Further it is clear from the use of the words "or encumbered" after "transferred" that the latter word does not include the transfer of an interest such as is acquired by a mortgagee and which leaves the ownership in the transferor. The reasonable inference therefore is that, when it is said the emoluments shall not be liable to be transferred, what is prohibited is transfer of ownership. The question then remains whether the grant of a permanent lease is a transfer of ownership. Under Regulation XXV of 1802 proprietors of land may, subject to certain restrictions, transfer by gift, sale or otherwise, their proprietary right in the whole or any part of their Zemindaries. In *Venkateswara Yettiappa Naicker* v. *Alagoo Mootoo Servagaran*[1] their Lordships of the Privy Council held that a permanent lease of portion of a Zemindari is not an alienation, and cannot be considered as a transfer within the words of the Regulation. It is clear from this that the grant of a permanent lease is not a transfer of proprietary right or ownership. We, therefore, dismiss the appeals which costs.

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1. (1861) 8 M.I.A. 327.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Munro.

Thiagaraja .. .. Appellant*
v. (*Plaintiff.*)
Rathnasabapathi Pillai and others .. Respondents.
(*Defendants*).

Thiagaraja v. Rathnasabapathi

Compromise—Construction—Limitation—One of two co-trustees barred—The other barred likewise.

Where a compromise in connection with a suit, after stating that the right to a trusteeship has remained in the family of the plaintiff and of the first defendant, went on to provide that the plaintiff's rights should after his death be exercised by his heirs and the first defendant's rights should be exercised by him and second defendant, and after the death of both of them, by their heirs.

Held:—That its effect was to constitute the representatives of the two branches of the family for the time being joint trustees and to give them joint interests as joint owners in the trust properties.

Held, also that if the right of one of two joint trustees to recover the trusteeship and the trust properties from a third person holding them adversely becomes barred by limitation the right of the other joint trustee becomes likewise barred although the latter sues within three years of his attaining majority.

Appeal from the decree of the Additional Subordinate Judge's Court of Tanjore in O. S. No. 16 of 1904.

The Advocate General (*P. S. Sivaswami Aiyar*) and *T. R. Venkatarama Sastri* for appellant.

P. R. Sundara Aiyar for respondents.

The Court delivered the following

JUDGMENTS:—*The Chief Justice.*—In this case I think the finding of the Subordinate Judge on the 5th issue, that the plaintiff's claim is barred by limitation, is right. It is admitted that Chockalingam, who represents one branch of the family, attained his majority more than 3 years before the institution of the suit. The other branch of the family is represented by the plaintiff. It is not admitted by the respondents that the suit was brought within 3 years of the attaining of his majority by the plaintiff. For the purpose of the question of limitation, I assume that he brought the suit within 3 years of his attaining his majority.

* A. No. 190 of 1905. 1st March 1910.

Thiagaraja v. Rathna sabapathi.

Chief Justice.

The Advocate-General, on behalf of the appellant, has contended that the effect of the compromise which was entered into between the two branches of the family in connection with Original Suit No. 4 of 1885, was to create a right in severalty in the two branches with reference to this trusteeship and the management of the properties. I do not think that is the effect of the compromise. Paragraph 6 states that the right of the trusteeship in question has remained in the families of the plaintiff and of the 1st defendant. Then it goes on to provide that the plaintiff's right shall, after his death, be exercised by his heirs, and the 1st defendant's right shall be exercised by him and by the 2nd defendant, and after the death of both of them by their heirs. I think the effect of the compromise is to constitute the representatives of the two branches of the family for the time being joint trustees and to give them joint interests as joint owners in the property in question, and I cannot accede to the contention of the Advocate-General that the effect of providing against the right of survivorship as between Chockalingam and the 1st defendant is inconsistent with giving joint rights to the representatives of the branches of the family for the time being. When, by virtue of the decree of the District Court in O. S. No. 4 of 1886, the families were dispossessed as regards the trusteeship, it was open to Chockalingam to take proceedings for the purpose of protecting the rights of the family. He failed to do this and that being so, it seems to me it is not now open to the plaintiff to say "it is true that my co-trustee did not think fit to take any action as regards establishing the family rights in connection with his trusteeship; but notwithstanding that, and notwithstanding the fact that the rights of my co-trustee as against third parties have become barred, it is open to me, now that I have attained my majority, to take proceedings for the purpose of establishing those rights." I think, on the facts of this case, the joint trustee having taken no steps to protect the trust and his right to take steps being now time-barred, it follows as a matter of law that the right of the joint trustee is also time-barred. With regard to the case of *Jagadindranath Roy* v. *Hemanta Kumari Debi*[1] which was relied on by the

1. (1904) I.L.R. 32 C. 129. (P.C.)

Thiagaraja v. Rathana-sabapathi.

Chief Justice

appellant, it seems to me that the case is clearly disiuguishable from the present one, because in that case the question we have to decide never arose for consideration. In that case there was no question as to joint rights and there was no question as to the legal effect of a joint owner failing to take steps to enforce his rights with reference to the rights of the other joint owners. That being my view with regard to the question of limitation, I do not think it necessary to decide the other question raised in this case, *viz.*, the question of *res judicata.* I think the judgment of the Court below is right and this appeal should be dismissed with costs. The appellant must pay Government the Court fees he would have had to pay if he had not been allowed to appeal as a pauper.

Munro J.:—Assuming for the sake of argument that the statement in the plaint and in the compromise, Exhibit A, are true, it is clear therefrom that the office belonged to the family as a whole, though for the sake of convenience certain arrangements were made as to the individuals in whom the actual management should rest. For more than 12 years before suit, the office and the properties which formed the subject of management were held adversely by the defendant, and, during the whole of that time, there was an adult male member of the family who could have taken steps to protect the alleged rights of the family. In these circumstances, I think the plaintiff's suit is clearly barred and would dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Krishna Doss Vital Doss .. Appellant* (*Accused*)

In re Purushottam Mulji .. Petitioner † (*4th Accused.*)

v.

King Emperor

Krishna Doss Vital Doss. v. Emperor.

Cr. P. C., Ss. 233, 239—Joint trial.

Where the charge against three of four accused persons was that they passed certain resolutions defamatory of the complainant and published them and that against the

* Cr. A. No. 272 to 274 of 1909. 19th October 1909.

† Cr. Revision case No. 220 of 1909. Cr. Rev. Petition No 159 of 1909.

Krishna Doss Vital Doss. v. Emperor.

fourth was that he transmitted the resolutions to a newspaper in Bombay : *Held* that the trial of the first three accused jointly with the fourth was illegal, in the absence of any evidence that the offences were committed in the "same transaction."

Appeal under S. 411 of the Criminal Procedure Code, against the conviction and sentence of the Chief Presidency Magistrate, Egmore, in Calendar Case No. 27,292 of 1906, connected with Criminal Appeals Nos. 272, 273, Criminal Revision Case No. 220 of 1909, and Criminal Revision Petition No. 187 of 1909, the revision petition being under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Judgment of the Chief Presidency Magistrate, Egmore, in Calendar Case No. 27,292 of 1906 in so far as petitioner is concerned.

R. Sadagopa Chariar and *S. Gurusami Chettiar* for the appellant in Appeal No. 272.

S. Gurusami Chettiar for the petitioner.

John Adam (*Crown Prosecutor*) and *A. S. Cowdell* contra.

The Court delivered the following

JUDGMENT :—The charge against the accused Nos. 1, 2 and 3 is that they passed certain resolutions defamatory of the complainant and published those resolutions. The charge against the 4th accused is that he transmitted the resolutions to a newspaper in Bombay. The charges against accused Nos. 1, 2 and 3 and the 4th accused were tried together, and objection is taken that the trial was illegal because the offences committed by accused Nos. 1, 2 and 3 and the offence committed by the 4th accused were not committed in the same transaction within the meaning of S. 239, Criminal Procedure Code. We think the objection is well founded. The Crown Prosecutor has not been able to refer us to any evidence sufficient to show that the offences were committed in the same transaction. All that is shown is that the 4th accused was a clerk in the service of one of the parties to the resolution who had died before the complaint in this case was put in. There is nothing to show that accused Nos. 1, 2 and 3 instigated the 4th accused to write the letter to the paper in Bombay of which he was a reporter, or that they knew anything about the matter until this newspaper

appeared or that accused Nos. 1, 2 and 3 and the 4th accused had any common purpose. S. 239 not being applicable, and Ss. 234, 235 and 236 not being in point, S. 233 of the Criminal Procedure Code prohibits the joint trial of accused Nos. 1, 2 and 3 along with the 4th accused.

Krishna Doss Vital Doss v. Emperor.

The principle of the decision in *Subramaniya Aiyar* v. *King-Emperor*[1] clearly applies to the present case. On the ground, therefore, that the trial was illegal we set aside the convictions. Considering the nature of the case and the fact that the accused have already been harrassed for 2½ years we do not think we should order a retrial. We, therefore, acquit the accused and direct that the fines, if paid, be refunded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice.

In re Kanagasabai .. Petitioner* in Cr. R.C. No. 483 of 1909 and Respondent in Cr. R. C. 622 of 1909. *Complainant in Cal. Case No* 51 *of* 1908 *on the file of the Sud- Divisional* 1*st Class Magistrate of Devakottah.*

AND

In re Ramamani Petitioner in Cr. R. C. 622 of 1909 and Respondent in Cr.R.C. 483 of 1909 ; (2*nd accused in the above case.*)

Cr. P. C., S. 517—*Properties partly self-acquired and partly joint family property.*

Where a mother prosecuted her daughter for theft of certain jewels some of which were joint family property and others were self-acquired property of the daughter and she was discharged, and the Magistrate ordered that the jewels should be given to the mother and daughter on their joint receipt : *Held* that the Magistrate had jurisdiction under S. 517, Cr. P. C., to make the order and that the order was good. The daughter was not entitled as of right to an order in her favour alone, merely because of her discharge in respect of the offence of theft of the jewels in question.

In re Kanagasabai.

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* Cal. R. C. Nos. 483 and 622 of 1009 ; Cr R. P. Nos. 360 and 476 of 1909. 2nd February 1910.

1. (1901) I.L.R. 25 M. 61.

In re Kanagasabai.

Petitions under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Additional Sessions Judge's Court of Madura in Criminal Revision Petitions Nos. 7 and 10 of 1909 confirming the order of the Sub-Divisional 1st Class Magistrate of Devakottah in Cal. Case 51 of 1908.

T. V. Seshagiri Aiyar for petitioner in Crl.R.C. 622 of 1907.

C. S. Venkachari for petitioner in Crl. R. C. 483 of 1909.

The Public Prosecutor (*C.F. Napier*) for the Crown in both.

The Court passed the following

ORDER:—In these cases the second accused and a man with whom she is said to have eloped were charged with theft of certain jewels. The case for the prosecution was that the jewels belonged to the mother of the 2nd accused. The case for the 2nd accused apparently was that the jewels belonged to herself. As to that the Magistrate has held that there was no evidence to show that the 2nd accused was the exclusive owner of the jewels or was in exclusive possession thereof. He further held that even on the assumption that she had contributed from her earnings towards their value, the joint control over and possession of the jewels were in the mother as the manager of the undivided family of which the 2nd accused was a member.

The 2nd accused was discharged on the charge of theft. The question then arose as to who was entitled to an order for the possession of these jewels. The order which the Magistrate made was that the jewels in question should be given over to the mother and the daughter on their joint receipt. There were appeals from this order, and the view taken by the Sessions Judge was that in every probability part of the property in question was joint family property and part the self-acquired property of the 2nd accused. In those circumstances he dismissed the appeals.

Now there are two petitions before me, one by the mother who says an order ought to have been made for the delivery of jewels to her and the other by the daughter who says that the order ought to have been made for the jewels to be delivered over to her.

It is not contended, and it could not be contended, on behalf of the daughter that she is entitled as of right to the order for which she asks solely upon the ground that in respect of the

charge of theft which was preferred against her with regard to these jewels an order of discharge was made. There can be no question that under S. 517, Cr. P. C., even where a party is charged with theft and that charge is dismissed or the party is discharged, an order can be made for the delivery of the subject-matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft. In support of that proposition I need only refer to the decision of this Court in Cr. R. C. No. 477 of 1905. That being so, there was jurisdiction under the section for making an order in favour of the daughter or in favour of the mother, or to make it in the form in which it was made in this case, *viz.*, in favour of both.

Now the question is :—Is the order of the Magistrate right? I have been referred to the case of *Chalakonda Alasani* v. *Chalakonda Ratnachalam*[1] which is referred to by the Magistrate and by the Sessions Judge. It seems to me, however, it does not support the contention preferred on behalf of the mother that she is entitled to an order in her favour for delivery of all the jewels, because in that case it was held that the jewels were joint family property and it was on the basis of that finding that the order in favour of the party who claimed the jewels was made. Here we have, though not exactly a finding, an expression of opinion by the learned Judge that part of the property was joint and part was self-acquired. Therefore it seems to me that *Chalakonda Alasani* v. *Chalakonda Ratnachala*[1] does not help the mother. On the expression of opinion given by the learned Judge that part of the property was the self-acquisition of the daughter and part was joint family property, I think he had jurisdiction to make the order which he made under S. 517, Cr. P. Code. I am not prepared to say that that order is wrong. Consequently both the petitions—petition by the mother No. 483 and petition by the daughter No. 622—will be dismissed.

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1. (1864) 2 M. H. C. R. 56.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

The Official Assignee of Madras and as such the assignee of the property and credits of Arbuthnot & Company, Insolvent Debtors. .. Appellant*

v.

A. E. A. Lupprian .. Respondent.

Official Assignee, Madras, v. Lupprian.

Banker and customer—Instructions by the customer to buy Government Promissory Notes on his behalf for Rs. 1,000 when his account reaches that sum—Failure of the banker to do so—Insolvency of the banker.

L had on the 5th August 1906 Rs. 600 standing to the credit of his current account with *A. & Co.* On that date he requested *A. & Co.* by letter to buy on his behalf a Government Pronote for Rs. 1,000 when the amount of his current account reached that sum. On the 30th September 1906, he again wrote and requested *A. & Co.* to buy the note as there was then Rs. 1,000 to his credit. Having received no reply, *L*, on 10th October 1906, called at *A. & Co.* and was told by two officers of the Bank that his instructions would be carried out in due course. The note was not purchased and *A. & Co.* stopped payment on 22nd October 1906.

Held per *Munro* J.—The money was held by *A. & Co.* in a fiduciary capacity, the effect of the customer's order being the same as if he had attended in person at the bank, drawn the money and then placed it in the hands of the Bank for the specific purpose of buying the note.

Per *Abdur Rahim* J.—The customer had only a right of proof as a creditor of the Bank, as nothing was done by it to show that the sum was held as trustee or agent for a specific purpose.

Appeal from the order and judgment of *Sir Arnold White*, Chief Justice, in the exercise of the jurisdiction of the High Court for the Relief of Insolvent Debtors at Madras in Petition No. 181 of 1906.

D. M. C. Downing and *King* and *Josselyn* for appellant.

Grant and *Greatorex* for respondent.

The Court delivered the following

JUDGMENTS:—*Munro* J.:—This is an appeal by the Official Assignee against an order of the learned Chief Justice sitting as Commissioner in Insolvency.

The facts are not in dispute. The respondent had, on the 5th August 1906, Rs. 600 standing to the credit of his current

*O. S. A. No. 50 of 1908. 28th September 1909.

Official Assignee Madras v. Lupprian. Munro J.

account with Arbuthnot & Co. On the above date he wrote to Arbuthnot and Co. and requested them to buy on his behalf a Government Promissory Note for Rs. 1,000, when the amount of his current account reached that sum. On the 30th September 1906 he again wrote and requested Arbuthnot & Co. to buy the promissory note as there was then Rs. 1,000 to his credit. He received no reply up to the 10th October. He then called at the Bank and was told by two officers of the Bank that his instructions would be carried out in due course. The promissory note had not, however, been purchased when Arbuthnot & Co. suspended payment on the 22nd October 1906, though it could have been bought for Rs. 1,000 between the 30th September and the 22nd October. On these facts the learned Commissioner held that Arbuthnot and Co, held the sum of Rs. 1,000 in a fiduciary capacity, and directed the Official Assignee to pay the whole amount to the respondent.

As pointed out in my judgment in O. S. Appeal No. 27 of 1908, it was competent for the respondent to give such directions with regard to the money standing to the credit of his current account as would thereafter cause Messrs. Arbuthnot & Co. to hold the money in fiduciary capacity. The effect of his order to them to buy was the same as if he had attended in person at the Bank, drawn his money, as he was entitled to do at any time and then placed it in the hands of Messrs. Arbuthnot & Co. for the specific purpose of buying the promissory note. In the face of the respondent's specific directions, Messrs. Arbuthnot and Co. were not entitled to use the money as their own but clearly held it in a fiduciary capacity. For the appellant, *In re Barnet's Banking Company, Ltd.* (*Massey's case*,)[1] is relied upon. There one Massey paid into a Bank a certain sum with instructions to remit it to another firm. Next day the Bank stopped payment without having made the remittance. It was held that Massey had only the right to prove with the general creditors, as the Bank stopped payment before taking any step to apply the money as directed. I am, with great respect, unable to see how this circumstance could affect the character of the money in the hands of the Bank. It was money which the Bank was clearly not entitled to use as its own. Heber Hart in his "Law of Banking" 2nd edition, page 146, makes the comment in a footnote that the

1. (1870) 39 L. J. Eq. 635.

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decision seems of doubtful authority, and we have not been referred to any case in which it has been followed. In *King* v. *Hutton*[1] it was pointed out that where a stock-broker receives from his client a sum of money for the purchase of stock, he has only a special property in the money so handed to him for a specific purpose and if he became bankrupt while the stock was unpurchased the money would not go into the general account in the bankruptcy. The same principle would, I think, apply when money is handed to a Banker for the specific purpose of purchasing securities and, as has been shown, that is, in effect, the position in the present case. In *Prince* v. *Oriental Bank Corporation*[2] it was observed that the decision in *D. E. Bernales* v. *Fuller*[3] might be supported on the ground that money had been paid in specifically for the payment of the particular bill and had been accepted by the Bankers for that purpose and that they made themselves, by so accepting the money, agents to hold it for the plaintiffs. Again in *Vaughan* v. *Halliday*[4] mention is made of the rule of law that if a remittance is sent for a specific purpose the person who receives the money must either apply it for the purpose for which it is sent or else return it. I think the order of the learned Commissioner is right and would dismiss the appeal with taxed costs to be paid out of the estate.

The appeal is dismissed accordingly.

Abdur Rahim J.:—One Lupprian, who had a current account with Arbuthnot & Co., had to his credit on the 5th August 1906, Rs. 600, and on that date he wrote to Arbuthnot and Co. requesting them to buy for him a Government Promissory Note for Rs. 1,000, when the balance to his credit reached the sum of Rs. 1,000. On the 30th September, the amount to his credit then being Rs. 1,000, Lupprian informed the Bankers of the fact and asked them to buy a Government Promissory Note for the amount. On the 10th October he, not having received any reply to his letter, interviewed some of the officers at the Bank who told him that no reply was necessary as his instructions would be carried out in due course. But in fact Arbuthnot and Co. never bought any promissory note before they stopped payment.

1. (1900) 2. Q. B. 504.
2. (1878) 3 A. C. 325 at page. 334.
3. (1811) 14 East. 590.
4. (1874) L. R. 9 Ch. A. C. 561, 568.

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I think the reasoning which I have applied to *Ramachandra Iyer's case*[1] also applies to these facts. The only difference between the two cases is that in the former the customer asked the Bankers to pay the money to himself while in the latter he asked him to invest the amount due from them in Government Promissory Notes. Having regard to the usual course of business of Bankers, I shall take it that Arbuthnot & Co. were under an obligation to buy the Government Promissory Note for Supprian just as they were in the other case to repay to Ramachandra Iyer the amount due to him. And it may be that their failure to invest the money as directed would entitle Lupprian to recover damages for breach of that contract. But the question here is :Did the direction given by Lupprian to his Bankers to buy Government Promissory Notes, followed by a promise on their part to carry out the direction, have the effect of making them bailees or trustees with respect to the amount in question? Such a case does not fall within the rule established by *In re Hallet's Estate*:[2] *Burdick* v. *Garrick*[3] and *Gibert* v. *Gonard*[4] and similar cases, nor, in my opinion, does it come within the meaning of that rule. As I have said, before you can make the rule applicable you must first of all find an entrustment or bailment. But it is argued that there is nothing to prevent a debtor consenting to hold the amount due from him as agent or bailee for the purpose of applying it in the manner designated by the creditor. For intance, in this case, it is said it would be unreasonable to insist that Lupprian should have gone to the counter of Arbuthnot & Co., and received the Rs. 1,000 due to him and then and there handed over the amount again to them for buying Government Promissory Notes. I think there is force in this argument in so far that the law would not insist upon a mere superfluous formality if there is evidence of some unequivocal act on the part of the debtor showing that he had changed his position into that of a bailee with respect to the money due from him. Obviously a mere promise to carry out the directions of the customer, so long as he does nothing towards appropriating the money to any specific purpose, will not suffice, for such a promise can have no higher legal effect, so far as the present question is concerned, than a promise to pay the debt. Something has to be done which would enable the Court to say that a particular sum is held by the

1. O. S. A. 27 of 1908.
2. (1880) 13 Ch. D. 696 (C. A.)
3. (1869) 5 L. R. 5 Ch. A. 233.
4. (1885) 54 L. J. N. S. Ch. 439.

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Banker as trustee or agent for some specific purpose and which he is not therefore entitled to use but which he is bound to keep apart from his own money. It may not be necessary to separate the amount physically by tying it up in a bag or otherwise, and the law would, I apprehend, regard it as a sufficient act of separation or appropriation if, for instance, an entry to that effect were made in the Banker's books of accounts. Here nothing was done by Arbuthnot & Co. towards appropriating the Rs. 1,000 to the purpose of buying any Government Promissory Notes and the matter rested in the mere promise when they became bankrupt. In taking this view of the law I am not going so far as *Massey's case*[1] in which it was held that when money is received by a Banker to be applied in a specific manner and that Banker stops payment before taking any steps towards applying it for that purpose, the payer cannot recover the money paid, and I shall have something more to say hereafter regarding that case. But I am distinctly of opinion that to hold that Arbuthnot and Co. ever assumed any fiduciary character in respect of the money sought to be recovered would be going much further than what these authorities warrant or the principles of equity would justify.

I hold, therefore, that Lupprian has only a right of proof as a creditor of Arbuthnot & Co., and the appeal ought to be allowed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Present :—Lord Macnaghten, Lord Atkinson, Lord Collins, Lord Shaw and Sir Arthur Wilson.

The Official Assignee, Bombay .. Appellant*

v.

The Registrar, Small Cause Court, Amritsar, and another .. Respondents.

Official Assignee, Bombay, v. Registrar, Small Cause Court, Amritsar.

Indian Insolvency Act, 11 *and* 12 *Vict. C.* 21—*High Court's jurisdiction under it—Punjab Laws Act (IV of* 1872)—*Insolvency jurisdiction under it—S.* 24 *of Act IV of* 1872—*Power of the Court under it—Order of a Court in the Punjab declaring debtors insolvent—Effect of such an order—Civil Procedure Code (Act XIV of* 1882) *Ch.* 20

* 9th March 1910.

1. (1870) 39 L. J. Eq. 635.

—Receiver—Transfer of debtor's property—Subsequent order of the High Court adjudicating the debtors insolvent—Vesting order made by the High Court—Its effect on the debtors' estate—Official Assignee.

Official Assignee, Bombay v. Registrar, Small Cause Court, Amritsar.

The Imperial Act, the Indian Insolvent Act (11 and 12 Vict., C. 21), of Parliament conferred upon what are now the High Courts in the Presidency towns in India, jurisdiction for insolvency purpose, extending over the whole of India, and for many purposes over much wider limits.

The system of insolvency created under the Punjab Laws Act (IV of 1872) in a series of sections beginning with S. 22, was effective only within the Punjab. The Insolvent Court at Amritsar, in the Punjab, in the presence of four out of the five members of a debtor firm, made an order declaring them insolvent, and requiring them to furnish security. and to put in lists of property, creditors and debtors. Subsequently the High Court of Bombay in its insolvency jurisdiction made an order adjudicating all the members of the said firm insolvent under 11 and 12 Vict., C. 21, and at the same time, a vesting order, vesting the property of the debtors in the Official Assignee of Bombay.

Held, that the Civil Procedure Code (Act XIV of 1882), Chapter 20, had no application. and that the property of the debtors in the Punjab had not vested in the Receiver appointed by the Court at Amritsar;

Held, also, that under the insolvency system established by 11 and 12 Vict., C. 21, the High Court, unimpeded by any other Court, could effectually administer the estate of the insolvents, including that in the Punjab, and when an adjudication was made by the High Court, the estate of the debtors vested in the Official Assignee, and he was to administer it;

Held, finally, that under the Punjab Laws Act (IV of 1872), S. 24, on which the power of the Court at Amritsar depended, what was entrusted to that Court was merely administration; that under that Act no transfer of property took place; and that the property of the debtors in the Punjab had not vested in that Court so as to exclude the operation of the Bombay vesting order.

Appeal against a judgment of the Chief Court of the Punjab (May 5, 1908) affirming a judgment of the Insolvent Estates Court, Amritsar (June 17, 1907).

One Chandri Ganesh Das and others (hereinafter referred to as debtors) were traders, who carried on business together at Amritsar, Benares and Bombay till November, 1906. On December 3, 1906, on the application of certain of their creditors, made under the Punjab Laws Act (IV of 1872), an order was made by the Insolvent Estates Court, Amritsar, directing that notices be issued calling upon the debtors to show cause, on December 12, 1906, why they should not be declared insolvent. On the latter date four of the debtors appeared, and were, with their own consent and in the absence of the other respondents to the said notices, declared insolvent, and the Registrar of the Small Cause

Official Assignee, Bombay, v. Registrar, Small Cause Court, Amritsar.

Court, Amritsar, who was the first respondent to the present appeal, was, therefore, appointed Receiver.

On May 31, 1907, certain other creditors preferred a petition, supported by their affidavit, to the Court for the Relief of Insolvent Debtors at Bombay, praying that all of the debtors should be adjudicated insolvent under the Indian Insolvent Debtors Act, 11 and 12 Vict., C. 21. An order of adjudication was made as prayed, pursuant to the said Act, and on the same day it was ordered that all their real and personal estate and effects be vested in the Official Assignee, Bombay, pursuant to S. 11 of the said Act. Intimation of this order was sent to the Judge of the Small Cause Court, Amritsar.

On June 10, 1907, the first respondent being about to proceed on leave, the second respondent was appointed Receiver in his place, and he proceeded to take steps for the realisation of certain properties of the debtors, or some of them. The present appellant applied to the Court for the Relief of Insolvent Debtors at Bombay, and on June 13, 1907, obtained an order that the first respondent should hold and retain the property in question, and show cause why it should not be delivered over to the appellant for the benefit of the general body of creditors of the debtors. The subsequent proceedings in Bombay are reported in the case of *In re Ganeshdas Panalal : R. D. Sethna* v. *R. S. D. Chopra*[1].

The appellant, on June 15, 1907, preferred two petitions to the Insolvent Estates Court, Amritsar, praying, in the one, that the said intended realisation should not take place, and, in the other, that all the property of the debtors should be handed over to him. Those petitions came on together for disposal before the Judge in the Insolvent Estates Court, Amritsar, who made an order dismissing them on June 17, 1907. In his judgment the learned Judge expressed the opinion that all the property of the debtors in the Punjab had vested, under the Civil Procedure Code (Act XIV of 1882), in the Receiver when he was appointed on December 12, 1906, and accordingly there were no rights subsisting in the debtors as regards such property which could be dealt with under 11 and 12 Vict., C. 21.

1. (1908) I. L. R. 32 B. 198.

The appellant thereupon preferred a petition to the Chief Court of the Punjab, praying that the said order be set aside, and that the respondent be ordered to deliver over all the property of the debtors to him, or to show cause in the Court for the Relief of Insolvent Debtors at Bombay, why such an order should not be made. The petition was by reason of the importance of the question involved, directed to be heard by two Judges, who dismissed the petition of the appelant, holding that the order of the Insolvent Court, Amritsar, was right, although they overruled the reasons upon which it was based, holding that the property had not vested in the Receiver under the Civil Procedure Code (Act XIV of 1882). They held that the order of December 12, 1906, "though irregular and incomplete, did in fact make "the debtors insolvent from the date it was passed," and that "the consequences of being insolvent attached to that "order, one of which, (on the construction then placed on the "Punjab Laws Act, 1872, Ss. 24 and 27) was that the property " of the debtors vested in the Court."

The appellant thereupon obtained leave from the Court for the Relief of Insolvent Debtors at Bombay to appeal against the judgment of the Chief Court of the Punjab, and obtained from the Chief Court a certificate that the case was, as regards value and nature, a fit one for appeal to His Majesty in Council, and the present appeal was thereafter admitted in the ordinary course.

W. O. Danckwerts, K. C. (with him *K. Brown*) for the appellant, referred to the Punjab Laws Act (IV of 1872), Ss. 22, 24, 25, 26, 27, 30 and 31, and submitted that as no order was made under S. 24 (6) the order of the Insolvent Debtors Court, Amritsar, dated December 12, 1906, and the subsequent proceedings did not operate to divest the property of the debtors situated in the Punjab, or vest the said property of the debtors either in the Receiver appointed by that Court or in the Court itself. The effect of the sections referred to is to provide for an attachment only of the debtors' property, and it has been held by this Board that an order of attachment of property simply prevents its sale, and is not a vesting order.

The Court at Amritsar had no power to divest the debtors of their property or to vest it in itself or any Receiver or other person.

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The Civil Procedure Code (Act IV of 1882) Ch. 20 does not apply here, and the debtors' property did not vest in the Receiver under S. 354 of that Code. The proceedings in Amritsar were conducted under Act IV of 1872. The Provincial Insolvency Act, 1907 (Act III of 1907) Ss. 16 and 13 have no application, as under S. 1 (3) of that Act it did not come into force until January 1, 1908. Further, no order was ever made whereby the debtors or any of them became "insolvents" within the meaning of Act IV of 1872. After referring to the Indian Insolvency Act, 1848 (11 and 12 Vict, C. 21) Ss. 2, 7, 8, 9 13, 21 and 36, he submitted that all the property of the debtors, including that in the Punjab, became vested in the appellant, as Official Assignee, under the order of the Court for the Relief of Insolvent Debtors at Bombay, and that the jurisdiction and orders of that Court overrode the jurisdiction and orders of the Insolvent Estates Court, Amritsar. He further referred to the Punjab Chief Court Rules and Forms made under S. 31 of Act IV of 1872, and submitted that the appeal should be allowed.

The respondents did not appear.

The Judgment of their Lordships was delivered by

Sir Arthur Wilson :—This is an appeal against a judgment of the Chief Court of the Punjab, which affirmed that of the Insolvent Estates Court, Amritsar. The controversey involved in the appeal relates to an alleged conflict of jurisdiction between two Courts, both having Insolvency Jurisdiction, but jurisdiction created by different legislative authority and different in its local extent. Under the Imperial Act of Parliament, 11 & 12 Vict., C. 21, relating to Insolvency Proceedings before what are now the High Courts in the Presidency towns in India, jurisdiction is conferred upon those Courts extending, for the present purpose, over the whole of India, and for many purposes over much wider limits.

Under the Punjab Laws Act, IV of 1872, in a series of sections beginning with S. 22, the Punjab legislature has created a system of Insolvency, of its own, but of course, such an Act can be effective only within the ambit of the jurisdiction of the legislature which passed it. These are the two systems of Insolvent administrations which have to be considered in disposing of the present appeal and have, if possible, to be reconciled.

There is, indeed, a third system in India, created by yet another legislative authority, namely, the Legislature of India, embodied in Chap. 20 of the Civil Procedure Code. This last mentioned system need not be further alluded to; for their Lordships are of opinion that the learned Judges of the Chief Court were right in considering that it had no application to the circumstances of the present case.

The facts of the present case are simple. The debtors were a firm of traders who carried on business at Amritsar and other places in the Punjab, and also at Bombay and elsewhere. On the 3rd December, 1906, the Amritsar Insolvency Court, on the application of a creditor, ordered a notice to issue calling upon the debtors to show cause why they should not be declared insolvent, and attaching their property in the Punjab. On the 12th December, in the presence of four out of the five members of the debtor firm, another order was made declaring them insolvent, and requiring them to furnish security and to put in lists of property, creditors and debtors.

On the 31st May, 1907, certain other creditors applied to the High Court at Bombay, in its Insolvency Jurisdiction, against all the members of the debtor firm, praying that they might be adjudicated insolvent under 11 and 12 Vict., C. 21. An order was made accordingly, and at the same time a vesting order, vesting the property of the debtors in the Official Assignee of Bombay. The Official Assignee, who is the appellant here, applied to the Insolvency Court at Amritsar to abstain from realizing the property of the debtors, and asked that that property should be made over to him. The Amritsar Court refused the application, holding that the property of the debtors in the Punjab had vested in a Receiver appointed by the Court, and that therefore there was no property of the debtors in the Punjab upon which the subsequent vesting order made by the Bombay Court could take effect.

Against this refusal there was an appeal to the Chief Court, and that Court held that the Amritsar Court was wrong in saying that the property in the Punjab was vested in the Receiver, but held further that the order appealed against was right on the ground that the property in question was by law vested in

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the Court, and therefore could not pass under the subsequent vesting order of the Bombay Court.

The facts which have been stated are those which appear to their Lordships material for the present appeal, which is brought against the order of the Chief Court. It is clear that under the insolvency system established by the Imperial Act, the High Court of Bombay, if unimpeded by any other Court, can effectually administer the estate of an insolvent in such a case as the present.

The question raised upon this appeal is, whether proceedings under the Punjab Act control the powers of the Bombay Court. It would be matter for regret if the powers of one Court to administer an estate completely were restrained by those of another Court which can only do so locally and partially. But it appears to their Lordships that no such inconvenience necessarily arises under the Imperial Act, 11 and 12 Vict., C. 21, when an adjudication is made by the Court which is now the High Court of Bombay, the estate of the debtor vests in the Official Assignee, and he is to administer it. What has been held Chief Court is, that in the present case, that law did not apply to property in the Punjab which had belonged to the debtors concerned, because that property had, before the date of the vesting order of the Bombay Court, been transferred under the Punjab Act, already referred to, to the Punjab Court. The question therefore is, whether the Chief Court was right in holding that the property in the Punjab had vested in that Court so as to exclude the operation of the Bombay vesting order.

Their Lordships are unable to agree with the learned Judges of the Chief Court..

The section of the Punjab Laws Act on which the power of the Punjab Court depends for the present purposes, is as follows :—

Section 27 says :—

"The property of the Insolvent shall be sold or administered under the direction of the Court, either through the agency of its own officers or of assignees to be appointed by the Court, in the manner most conducive to the interest of the creditors, and the proceeds shall be divided rateably amongst them."

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It appears to their Lordships to be clear that under the Punjab Act, what is entrusted to the Punjab Court is merely administration, and that under that Act no transfer of property takes place.

Their Lordships regret that they have to deal with this question in an appeal heard *ex parte*. The difficulty thus arising is diminished, however, by the fact that the question is purely one of law.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and the judgments of the Chief Court of the Punjab and of the Insolvent Estates Court, Amritsar, set aside with costs in both Courts, and in lieu thereof it should be declared that the property of the Insolvents in the Punjab is vested in the Official Assignee, Bombay.

The costs of this appeal are to be taxed as between solicitor and client and paid out of the Insolvents' estate.

Solicitors: *Monier Williams*, *Robinson* and *Milroy* for appellant.

Appeal allowed.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Lala Rup Chand (since deceased) now represented by Hulas Rai and another .. Appellants*

v.

Jambu Parshad .. Respondent.

Rup Chand v. Jambu Parshad.

Hindu Law—Adoption—General rule as to adoption of a married man—Exceptions—Mayukha—Custom—Jains.

By the general Hindu law applicable to the twice-born classes, a boy cannot be adopted after his marriage. To this rule, there is an exception in the case of persons governed by the *Mayukha*, and other exceptions have been held to exist by custom.

The Agarwala Jains belong to one of the twice-born classes, and are governed by the ordinary Hindu law (which is *Mitakshara* law), unless and until a custom to the contrary is established.

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* 9th March 1910.

Rup Chand. v. Jambu Parshad.

Their Lordships upheld the finding of the High Court that the evidence in the present case established the custom set up "that among the Jains adoption is no religious ceremony, and under the law or custom there is no restriction of age or marriage among them," but held that the present case, where the evidence regarding the alleged custom was limited to a comparatively small number of centres of Jain population, would make an unsatisfactory precedent if in any future instance fuller evidence should be forthcoming.

[*Asharfi Kunwar v. Rup Chand*[1] affirmed.]

Appeal from a judgment (in the case of *Asharfi Kunwar* v. *Rup Chand* [1]) and decree of the High Court at Allahabad (March 5, 1908), reversing those of the Subordinate Judge of Saharanpur (November 8, 1905).

The parties to the litigation were Jains, and the question for determination related to the validity of the adoption of a married man by a Jain.

One Lala Mittar Sain died in 1890 without leaving any male issue. He left two widows, namely, Musammat Asharfi Kunwar (senior) and Musammat Rikhi Kunwar (junior), a daughter, Musammat Raj Kali, and his mother, Musammat Malhi Kunwar. Raj Kali and Rikhi Kunwar died in June, 1900.

The suit was brought in the Court of the Subordinate Judge of Saharanpur, on October 11, 1904, by the appellant, Rup Chand, the nearest reversionary heir of the said Mittar Sain, against Asharfi Kunwar, Malhi Kunwar, and the respondent, Jambu Parshad. The plaint alleged *inter alia* that Asharfi Kunwar had given out on April 14, 1900, that she had adopted the respondent and had on that day executed a deed of adoption in his favour; that no adoption of the respondent in fact took place or was intended to be effected (no mutation of names or transfer of ownership having been made); and that owing to the respondent being married and 23 years old his adoption was invalid. The appellant prayed for a declaration that the respondent was not the adopted son of the said Mittar Sain, and that the said document dated the 14th April, 1900, was null and void as against the appellant's reversionary right.

By a written statement dated the 25th March, 1905, the respondent (his co-defendants joining with him) alleged *inter alia* that Asharfi had publicly adopted him in the meeting

1. (1908) I.L.R. 30 All. 197.

of the brotherhood under a legal authority, on April 14, 1900, and had executed and registered a deed of adoption on that date with the intention of making the adoption; that she in fact had adopted him and made him the owner of the property; that the mutation of names was omitted by mutual agreement; and that "among the Jains adoption is no religious ceremony, and under the law or custom there is no restriction of age or marriage among them."

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Of the seven issues fixed by the Subordinate Judge it is necessary to state only the following :—

"4. How does the fact that before the alleged adoption Jambu Parshad had been married and how does his age at the time of the adoption affect the claim? Whether according to law or custom such an adoption would be validly made?"

The Subordinate Judge held that "in these provinces, according to the doctrine sanctioned by the Benares School of Hindu Law, a married man of the three regenerate classes cannot be adopted, whether he be of the same *gotra* as the adopter or not"; and also that "the existence of a custom of the adoption of a married man by Agarwalla Jains, and especially by a widow, for here the adoption has been made by a widow without the consent of the nearest reversionary heir of Mittra Sain, has not been proved by the defendants." In the result he decreed the appellants' suit.

The High Court, on appeal, upheld the adoption observing that "in view, however, of the ruling of their Lordships of the "Privy Council that in Jain cases it rests on the party alleging a "custom or practice at variance with that of orthodox Hindus to "prove his allegation, we have treated this burden as one which "lay on the defendant-appellant. This *onus* he has, in our "judgment, satisfied, and we remain with the same opinion which "we expressed in *Manohar Lal* v. *Banarsi Das* [1], that the "marriage of a Jain is no bar to his adoption."

Asharfi Kunwar and Malhai Kunwar died during the pendency of the appeal in the High Court, which was prosecuted by the respondent alone. In the result the High Court passed a decree allowing the appeal.

1. (1907) I.L.R. 29 A. 495.

Rup Chand v. Jambu Parshad.

Rup Chand, thereupon, appealed to His Majesty in Council and, on his death, his sons and legal representatives were brought on the record.

De Gruyther, K. C. (*H. Cowell* with him) for the appellant:—The parties are Jains, and the ordinary Hindu law of Mitakshara applies to them in the N. W. Provinces, except so far as it is modified by special custom—*Bhagwandas Tejmal* v. *Rajmal* [1] and *Chotay Lal* v. *Chunno Lal* [2]. The High Courts at Allahabad, Bombay and Calcutta are agreed on the point—*Bachebi* v. *Makhan Lal* [3]; *Shimbhu Nath* v. *Gyan Chand* [4]; *Ambabai* v. *Govind* [5]; *Musammat Mandit Koer* v. *Phool Chand Lal* [6]. The Jains separated from the Hindus, but they did not cease to belong to the Hindus. Lapses, such as in matters of diet and ceremonial observances, from orthodox Hindu practice do not have the effect of excluding one from the category of Hindu—*Rani Bhagwan Kuar* v. *Jogendra Chandra Bose* [7]. The Jains belong to one of the twice-born classes. The adoption of a married man among the twice-born classes is invalid, even when the adopted son and the adoptive father are members of the same *gotra* by birth—*Pichuvayyan* v. *Subbayyan* [8].

An exception to this rule exists when the parties are governed by the *Mayukha*—HINDU LAW BOOKS, by STOKES, (1885, Madras), *Vyavahara Mayukha*, Ch. IV, S. 5, § 19, p. 64. But the parties here are not governed by the *Mayukha*. It is submitted that if no special custom varying the general Hindu Law rule, that the adoption of a married man is invalid, is established, the adoption here is invalid. If such a custom is proved it must prevail. [*Sir Robert Finlay*:—We say that the custom of non-adoption of a married man was introduced long after the Jains separated from the Hindus.] The High Court, in holding that the adoption of a married man here was valid, relied upon the case of *Manohar Lal* v. *Banarsi Das*, [9] where it was held that, according to the law and custom amongst the Jain community, a married man may lawfully be adopted. But see MAYNE on *Hindu Law and Usage*,

1. (1873) 10 Bom. H. C.-R. 241, at pp. 253 and 255, et seq.
2. (1878) L.R. 6 I. A. 15 at p. 30.
3. (1880) I.L.R. 3 A. 55.
4. (1894) I.L.R. 16 A. 379.
5. (1898) I.L.R. 23 B. 257.
6. (1897) 2 C. W. N. 154.
7. (1903) L.R. 30. I.A. 249 at 257.
8. (1889) I.L.R. 13 M. 128 at 129.
9. (1907) I.L.R. 29 A 495

(7th Ed.), pp. 56, 57, § 50, as to when a custom is held to be proved. That case cannot be a precedent here. Again, the custom in that case was proved by documentary evidence. There is no such evidence in the present case. In fact there is no evidence proving the adoption. The High Court, in deciding this case, ought not to have relied upon the last mentioned case, but ought to have considered the evidence on record in this case, and decided whether the custom set up was proved. There is not a single instance proved where a married man was adopted and succeeded to his adoptive father as a consequence of such adoption. The instances are taken from a very small number of places of Jain population, and they are not enough to prove the custom. As to what proof of custom is required, see *Chandika Bakhsh* v. *Muna Kunwar* [1], where it was held that four instances of the custom of comparatively modern date did not prove the custom. It is submitted that the respondent has not discharged the *onus* of proving the custom that rests upon him. The burden of proving that the adoption did, in fact, take place is on the respondent, but there is no evidence of the *factum* of adoption on either side. It is submitted that the respondent has failed to prove that he was adopted as alleged. Reference was also made to MAYNE on *Hindu Law and Usage*, (7th Ed.), §. 132, p. 169.

Sir Robert Finlay, K. C., and *Nehru* (*G. E. A. Ross* and *B. Dube* with them) for the respondent :—The original appellant died since the appeal was admitted, and on his death the action has abated. The appellant never attempted to question the *factum* of adoption. The evidence given by the defendant was not contradicted by the plaintiff, who now cannot raise the point. There is no doubt that a married man may be adopted in the Punjab. [*De Gruyther* :—It is not so in the Punjab.] The Jains belong to the twice-born class, and the obstacle against adoption among the twice-born classes is the investiture of the sacred thread, a ceremony which must precede that of marriage; hence a married man cannot be adopted among the twice-born classes. But among the Jains there is no investiture of the sacred thread. How then can such an investiture be a bar, and how can marriage, which takes place after that

1. (1901) I.L.R. 24 A. 273, (P. C.)

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ceremony, be also a bar among the Jains? Doctrines of Hindu Law based on religious ceremonies are not applicable to the Jains. Among the Sudras a boy can be adopted at any age prior to his marriage—*Ranee Nitradaye v. Bholanath Doss*[1]. It is not decided that marriage is not a bar amongst the Sudras, and it is argued on analogy that there is no authority in support of the adoption of a married man. But the law applicable to the Jains is the law of the twice-born and not of the Sudras—*Hindu Law Books*, by STOKES, p. 644, para 32. The qualifying age of the adopted son among the Jains is said to extend to the thirty-second year—*Maharaja Govindnath Ray* v. *Gulab Chand* [2]. The respondent was, at the time of his adoption, 23 years of age.

It is contended on the authority of *Sheo Singh Rai* v. *Musammat Dakho* [3] and *Chotay Lal* v. *Chunno Lal*, [4] that the Hindu Law rule relating to the adoption of a married man must be followed unless some restriction or exception is established. The questions in those two cases related to succession, and the adoption of a daughter's son. Those two points were established long before the Jains separated from the Hindus, and, in consequence, were binding on the Jains. But the point raised in this case was not established before the separation of the Jains, who are not a sect of the Hindus, but stand midway between them and the Budhists. In the law of adoption restrictions as to age, investiture and marriage were introduced among the Hindus long after the Jains separated from them. Such restrictions could not, therefore, apply to the Jains. When a doctrine of Hindu Law is of comparatively recent origin, the presumption is that it is not applicable to the Jains, and that it must be established by evidence, when it is contended that such a doctrine is applicable to the Jains. The following were relied on in support of this argument :—Dr. Hoernle's Presidential Address to the Royal Asiatic Society of Bengal, (1898), pp. 39, 40 and 42. *Bhagwandas Tejmal* v. *Rajmal*[5]. MAYNE on *Hindu Law and Usage*, (7th Ed.) pp. 131-136, 172, 179, 192, 193 and 820. The Hindu Law of

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1. (1858) Decisions of the Sudder Dewanny Adawlut (Calcutta), p. 553.
2. (1833) 5 Macnaghten's Sudder Dewanny Reports, p. 296.
3. (1878) I. L. R. I. A. 688 (P C.)
4. (1878) I. L. R. 4 C. 744 (P. C.)
5. (1873) 10 Bom. H. C. R. 241, at p. 247, et seq.

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Adoption, by G. SARKAR, pp. 359 361, 362, 364, 367, and 452-454 ; JOLLY, p. 161 ; *Sheo Singh Rai* v. *Musammat Dakho*[1] ; *Chotay Lall* v. *Chunno Lal*[2]; *Hindu Law Books*, by STOKES, pp. 575 (S. 22) and 580 ; *Ganga Sahai* v. *Lakhraj Singh*[3]. Among Brahmins the adoption of a boy of the same *gotra*, after the Upnayanam ceremony, has been held valid—*Vira Ragava* v. *Ramalinga*[4]. There is a great body of evidence that among the Jains a married man may be adopted. A statement that a married man can be adopted is admissible in evidence under the Indian Evidence Act, (I of 1872), Ss. 48 and 49, and is good evidence of custom without giving any specific instances. It is submitted that the custom alleged is established.

De Gruyther, K. C., in reply, as regards the validity of the adoption of a married man, further referred to the following :— Hindu Law, by Strange, (Madras, 1864), pp. 91 and 331 (case No. 21); West and Buhler, (Bombay 1884), pp. 1065 and 952 (A. 1, 13-Jains); Jolly, (1885) pp. 161, 309 and 310, (see Dattakatilaka and Dattak Sidhantamanjari); Hindu Law of Marriage and Stridhan, by G.D. Banerjee, (1879), pp. 133 (bottom) and 259 (intermarriage among Jains) ; Steele on the Law and Custom of Hindu Casts, (London, 1868), p. 22 ; Mayne on Hindu Law and Usage, (7th Ed.) pp. 133, 134, 175 (§ 136), and 180 (§ 141) ; The Hindu Law of Adoption, by G. Sarkar, (1891), pp. 252, 254; *Peria Ammani* v. *Krishnasami*[5].

On the question of the evidence required to prove custom, he relied upon *Ramlakshmi Ammal* v. *Sivanath Perumal Sethurayar*[6] and *Chandika Bakhsh* v. *Muna Kuar*[7].

The Judgment of their Lordships was delivered by

Sir Arthur Wilson :—This is an appeal from a judgment and decree of the High Court of Allahabad which set aside those of the Subordinate Judge of Saharanpur and dismissed the plaintiff's suit.

The plaintiff sued as the nearest reversionary heir of one Lala Mittar Sain, a member of the Jain Agarwalla community, who lived and died in the district of Saharanpur.

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1. (1878) I. L. R. 1. A. 688. (P. C.)
2. (1878) I.L.R. 4. C. 744. (P. C.)
3. (1886) I. L. R. 9 A. 253.
4. (1883) I. L. R. 9 M. 148.
5. (1892) I.L.R. 16 M. 182, at p. 184.
6. (1872) 14 M. I.A. 570 at p. 588.
7. (1902) I.L.R. 24 A. 273 (P.C.).

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The defence to the plaintiff's claim was based on the allegation that the defendant, Jambu Parshad, was the adopted son of the deceased Lala Mittar Sain, adopted by his senior widow after the death of her husband, and it was contended that the title of the adopted son excluded any right that might otherwise have existed in the plaintiff. The first Court decided against the adoption and made a decree in the plaintiff's favour. The High Court held that the adoption had taken place in fact and was valid in law, and therefore reversed the decision of the first Court. Hence the present appeal.

That the adoption took place in fact is no longer in dispute. The sole question which has been seriously argued is whether the adoption was valid in law, the objection to the adoption being based upon the fact that the adopted son was already married at the time of his adoption. So far as the proper law applicable to the case is concerned there is nothing in doubt.

There is no longer any question that by the general Hindu Law applicable to the twice-born classes, a boy cannot be adopted after his marriage, and there is no doubt that the Agarwalla Jains belong to one of the twice-born classes.

To this rule there is an exception in the case of persons governed by the Mayukha, but that exception has no application to the present case. Other exceptions have been held to exist by custom. Again there is no doubt that the Agarwalla Jains are governed by the ordinary Hindu Law (which for the present purpose means the Mitakshara Law) unless and until a custom to the contrary is established.

The question in the present case was, and is, whether a custom, applicable to the parties concerned, and authorizing the adoption of a married boy, has been established. This is strictly speaking a pure question of fact determinable upon the evidence given in the case. The custom alleged in the pleading was this: "Among the Jains adoption is no religious ceremony, and under the law or custom there is no restriction of age or marriage among them." And that appears to be the custom found by the High Court to exist. But upon the argument before their Lordships it was strenuously contended that the evidence in the present case, limited as it is to a comparatively small number of centres

of Jain population, was insufficient to establish a custom so wide as this, and that no narrower custom was either alleged or proved. Rup Chan v. Jambu Parshad

In their Lordships' opinion there is great weight in these criticisms, enough to make the present case an unsatisfactory precedent if in any future instance fuller evidence regarding the alleged custom should be forthcoming.

But with regard to the relative rights of the parties to the present case, who have had full opportunity of producing whatever evidence they desired to produce, the case was properly dealt with by the High Court upon the evidence before it. And their Lordships are not prepared to dissent from the finding of the learned Judges of the High Court that the evidence in the case supported the custom. Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellants will pay the costs.

Solicitors: *Ranken Ford, Ford and Chester*, for the appellants

Solicitors: *Barrow*, *Rogers* and *Nevill* for the respondent.

Appeal dismissed.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Present:—Lord Macnaghten, Lord Collins and Sir Arthur Wilson.

In the matter of Chanda Singh, a Pleader of the Chief Court of the Punjab.* *In re* Chanda Singh.

Pleader—Professional misconduct—Admission of charges—Formality in drawing up the charges.

Two learned judges of the Chief Court found that the appellant, who acted for the plaintiff as pleader in a pre-emption suit, had taken advantage of that position of trust in order to cheat his client out of the subject-matter of the suit, and obtain it for himself; and made an order removing the appellant permanently from the list of pleaders entitled to practise. The appellant thereafter presented a petition asking for a review of that order on various grounds. At the hearing of that petition his counsel in his presence withdrew all the grounds alleged in the petition as grounds for review, admitted that the facts were as found in the order under review, and stated that the appellant had been guilty of grave professional misconduct. Under these circumstances, the Court reviewed its former decision and made a second order reducing the penalty imposed upon the appellant to suspension from practice for a period of three years.

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* 1909 November 9 & 10 and 1910 February 22.

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Held, that the charges were not perhaps very formally drawn up, but the substance of what was imputed to the appellant was perfectly well understood by all parties; that as the appellant, and his counsel on his behalf, deliberately admitted the charges made against him in the sense in which those charges were understood by the learned Judges, the latter had ample justification for the orders, which they passed; that the latter of those two orders went as far in the direction of mercy as it properly could go; and that the appeal should be dismissed.

Appeal from two orders of the Chief Court of the Punjab, dated respectively the 16th March, 1908, and the 5th February, 1909.

By the first order the Chief Court removed the appellant permanently from the list of pleaders entitled to practise on the ground of professional misconduct. By the second order the Court reviewed its former decision, and reduced the penalty upon the appellant to suspension from practice for a period of three years.

The facts of the case are fully set out in the following judgment of the Court (*Johnstone* and *Robertson*, J J.) delivered on March 16, 1908 :—

"The question we have to consider is, stated briefly, whether Chanda Singh, Pleader, of Ferozepur, has or has not been guilty of professional misconduct warranting disciplinary action in connection with the pre-emption suit, *Sadhi Partab Singh* v. *Mussammat Facth Bano* (Vendor) and others (Vendees), which was instituted in the Court of the District Judge of Ferozepur in 1896. A brief history of the case will have to be given here for the better understanding of the specific charges which the pleader has had to meet.

There were three other suits for pre-emption of the same land lodged about the same time. In Partab Singh's case and in one other, in which we are informed Partab Singh's right was not denied, Chanda Singh appeared for the plaintiffs. All four suits were dismissed on the score of limitation. The other three claims were dropped, but Partab Singh's case was appealed to the Chief Court, which on 21st October, 1889, held the suit not barred by time, and made a remand under S. 562, Civil Procedure Code. The District Judge again took up the case, which was once dismissed for default and then readmitted, and the case dragged on till 9th April, 1901, when upon an application by Chanda Singh reporting the death of Partab Singh,

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plaintiff, the Court substituted for him his minor son, Harbans Singh, under the guardianship of his relative Bhagat Singh. On 23rd December, 1901, the District Judge passed a decree for possession of 1,026 *kanals* 3 *marlas* (out of the 1,274 *kanals* sued for) on payment of Rs. 8,968 minus costs, within two months. On 20th January Chanda Singh paid in the necessary sum on behalf of the minor plaintiff, and took possession, as a pleader, for the minor. Both parties appealed to the Chief Court (Civil A. Nos. 390 and 377 of 1902) on the 9th and the 22nd May, 1902, respectively. In the course of the proceedings in appeal a number of things happened which have a bearing on the enquiry in which we are engaged. On the 19th May, 1902, Chanda Singh, supported by the affidavit of Bhagat Singh, prayed that his name be substituted as plaintiff for the minor's name on the ground that he (Chanda Singh) had paid in the pre-emption money, and so had bought the minor's rights. On 10th July, 1902, *Rattigan* J. granted the prayer, "subject to all just exceptions at the hearing." On 18th September, 1902, three petitions, (Nos. 381 to 383) were filed in the Chief Court, and laid before a judge in chambers, *viz.*, No. 381, by the minor through his mother, asking for reversal of *Rattigan* J's order of 10th July, 1902; No. 382, by the same, making various allegations against Chanda Singh and Bhagat Singh, and asking that Mussammat Ishar Kaur be appointed guardian *ad litem* for the minor (really next friend) *vice* Bhagat Singh; No. 383 by the same, asking that inquiry into Chanda Singh's professional conduct be made. Notices were issued and reports called for, and in the end Petition No. 381 was granted, as also No. 382, and the matter of Chanda Singh's conduct was left over till the decision of the appeal. Chanda Singh also ceased to be counsel for the minor. The appeal went on and the defendant's appeal (377) was accepted in part and the sum to be paid in was raised to Rs. 9,440-3-9 while plaintiff's appeal was dismissed. This was on 5th January, 1907; so much for the outline of the history of the pre-emption case as shown in that file. Meantime on the 6th August, 1902, Chanda Singh brought a suit against the minor for possession of the land aforesaid, or, in the alternative, for Rs. 9,250 and interest and costs. The allegations made and the

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grounds set forth in his plaint are important. It is stated that Partab Singh, original plaintiff in the pre-emption case, having died, there was no near relative of the minor aforesaid, who could pay in the price fixed, and, therefore, Bhagat Singh, the next friend of the minor. 'in accordance with the wish and consent' of Musammat Ishar Kaur, the minor's mother and guardian *ad litem*, Jawala Singh, uncle of the minor, Ish Sing, the maternal uncle of the minor, Buta Singh and Sher Singh, maternal uncles of the minor's mother, Ranjit Singh and Bawa Ram Nath, the other relatives of the minor, requested Chanda Singh to pay in the money and to purchase the land for himself; that Chanda Singh did so, and began to use the land as his own; that he applied for mutation in his own name, but was refused at the instance of Musammat Ishar Kuar, and was then dispossessed. Here it is fairly clear that the allegation was that it was only after the death of Partab Singh, and the successful issue of the suit for pre-emption in the District Judge's Court that the suggestion of Chanda Singh's taking over any part of the bargain cropped up.

This suit was dismissed on the 27th May, 1904, parties to bear their own costs, and Chanda Singh promptly filed an appeal which was disposed of by the Chief Court on the 23rd April 1906, partly in his favour. He was given a money decree for Rs. 8,000 odd, recoverable after decision of the pre-emption appeals then pending, and subject to certain conditions we need not detail here.

It was in the course of these two cases that facts came to light which rendered it desirable that a regular enquiry into, and adjudication upon, Chanda Sing's professional conduct should be made.

It will be convenient now to state the specific charges made against Chanda Singh, and, where necessary, to explain. They are these, *viz* :—

1. That Chanda Singh started, from the beginning, lending money to Sardar Partab for the expenses of the pre-emption suit in which Partab Singh was his client.

2. That when he advanced further sums to him in connection with the appeal (*i.e.*, the appeal against the dismissal of

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August, 1896) in that case, he took from him an agreement of an improper kind, dated 17th February, 1897, under which Chanda Singh was to spend, and Partab Singh was to sell, an adequate proportion of the land to be pre-empted in consideration of Chanda Singh's expenditure.

3. That Bhagat Singh was really appointed next friend to the minor for the case as a tool of Chanda Singh, and not with the consent of Mussammat Ishar Kaur.

4. That Bhagat Singh's letter to Chanda Singh of 2nd January, 1902, asking him to pay the decretal sum was collusive.

5. That it is not proved that Mussammat Ishar Kaur ever asked Chanda Singh to pay the decree money and buy the land; that the letters to the effect were never authorised by her.

6. That the agreement of 17th February, 1897, was never returned to Mussammat Ishar Kaur.

7. That the application for the mutation of the land in favour of Chanda Singh (1902) was made by his tool Bhagat Singh. That is, the application was in prejudice of the minor's interests and collusive.

Chanda Singh admits the first of these charges. As regards (2) he admits advancing further sums and taking an agreement from Partab Singh, but he asserts that under the agreement Partab Singh was to sell to him, by way of liquidating his advances, not the pre-emption land, but his own land already held by him, and contends that this agreement was not improper. As to (3) Chanda Singh admits that Bhagat Singh was appointed next friend to the minor, but he denies that he was his, Chanda Singh's, tool, and asserts that Mussammat Ishar Kaur was agreeable to his appointment. As to (4) he admits the letter, but says it was not collusive. Para (5) Chanda Singh traverses *in toto*, as also para (6). And lastly, he denies (7) that the application for mutation was *mala fide*. Clearly, then, the important questions are :—

(*a*) Did Chanda Singh speak truly when he said he returned the agreement to Mussammat Ishar Kaur?

(*b*) What were the terms of that agreement, and was it an improper one for a Pleader to enter into in the circumstances?

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(*c*) Was Chanda Singh in collusion with Bhagat Singh?

(*d*) Did Mussammat Ishar Kaur ask Chanda Singh to deposit the pre-emption money?

As regards (*a*), we observe that in C. A. 585 of 1904, aforesaid, to which Chanda Singh was a party, it was held, after full consideration, that Chanda Singh did not return the document, the reason for his keeping it back being his fear of professional consequences. That finding we decline to review, and thus we find at once that Chanda Singh has made a false statement on solemn affirmation in Court. Apart from that finding reference to the statements of two respectable witnesses, Lala Amir Chand and Lala Ram Nath, make the matter quite clear.

Regarding (*b*), we have heard a long and ingenious argument from Mr. Kirkpatrick, but the matter is really very simple. No doubt we cannot allow Chanda Singh to give secondary evidence of the contents of a document which was with him and which he declines to produce, and the loss of which he has not established; but it is open to the other side to prove its contents either by his admissions or by any relevant evidence. Chanda Singh has not perhaps been very consistent in his description of the documents. It may be said that consistency and truth-telling are not his conspicuous characteristics, as we have already seen, and as will further appear immediately. In his statement of 24th March, 1903, before the Divisional Judge, Ferozepur, to be found in the printed paper book of C. A. 585, of 1904, aforesaid, he no doubt said that Partab Singh was to sell his (*apue*, in the vernacular version) land to liquidate the debt to Chanda Singh, but in an earlier statement, made on 19th July, 1902, before Rai Ameer Chand, Revenue officer, he said, "He too, promised to sell to me, after success, the whole of the land, or what remained surplus, after keeping with himself a part thereof as required by him. It was agreed in writing." This statement was made at the time when Chanda Singh was striving to get the land secured by the decree, mutated in his name: and, in our opinion, it is now clear that the agreement was an improper one. Partab Singh was to hand over to Chanda Singh the whole part of the pre-emption land in case of success.

As regards (*c*), it is not directly proved that Bhagat Singh was collusively appointed next friend of the minor in the pre-emption suit, but, in our opinion, there are strong indications that he acted collusively in the interests of Chanda Singh when appointed. It was he who applied to the Revenue authorities in May, 1902, for mutation of the pre-empted land in favour of Chanda Singh, and nowhere did he resist Chanda Singh in his designs upon the property. It is not necessary to suppose that he positively wished to injure the minor; it is enough that he wished to benefit Chanda Singh by allowing him to use the minor as a cloak for his designs, and it is significant that the minor's mother should turn upon him when she saw what was going on. She had no motive but her son's interests, and she saw that those interests would not be safe in the hands of Bhagat Singh.

As regards (*d*), it has been plainly held in Civil Appeal 585 of 1904, Chanda Singh being a party and the point being one of vital importance in the case, that Mussammat Ishar Kaur did not ask Chanda Singh to deposit the pre-emption money, and did not authorise the letters which Chanda Singh relies upon to prove that she did, and that she never consented to his becoming purchaser. In the same statement before the Revenue officer, already referred to, dated 19th July, 1902, Chanda Singh said that Bhagat Singh sold to him the land, and Mussammat Ishar Kaur did not and could not. This statement he now contradicts, and has on various occasions contradicted. To our minds it is clear that Chanda Singh speaks falsely when he says the lady asked him to pay in the money and take the land.

Thus we think the extreme impropriety of the conduct of this pleader is established. He has made false and contradictory statements on matters of fact, and these false statements must have been made in bad faith. He entered into an improper agreement with a client. When that client died leaving a minor son with a mother as guardian, Chanda Singh, taking improper advantage of the position, plotted to secure for himself the benefit of the litigation, and to further his aims he made a tool of the minor's next friend, Bhagat Singh, getting him to make applications in his favour, and to write collusive letters pretending

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that Mussammat Ishar Kaur was agreeable to Chanda Singh taking the benefit of the litigation.

Owing to the courage and resolution displayed by Mussammat Ishar Kaur when she began to understand what was going on, Chanda Singh's designs were frustrated, and he has apparently made but a poor bargain of the whole affair, having apparently lost money; but we are of opinion, even so, that very serious notice should be taken of the case under S. 13 (*b*) of the Legal Practitioners' Act, 1879. If Chanda Singh were a young and needy man, who had committed a single act of an improper kind with the object of getting work, or if we could treat the case as one of misconduct due to inexperience, there might be something to be said for a display of leniency. In such a case we might not think it our duty to bring the career of the offender at the bar to a final stop, but might consider a temporary suspension from practice a sufficient punishment. But Chanda Singh's case is different from any of these. He is about forty-five years of age, and has been a legal practitioner since 1887, when he was (in January) admitted as a Mukhtar. He has always been recognised as a man of intellectual qualities and of much legal learning, and it is understood that he has enjoyed a large practice and has made money.

The conduct of which we have found him guilty is not an isolated act of impropriety, or imprudence, or even of dishonesty, but a course of knavery extending over years, during which he has not hesitated to attain his ends by false swearing. We think that it is undesirable he should ever again have an opportunity of bringing discredit upon the honourable profession to which he belongs, and we therefore direct his name be removed from the List of Pleaders of this Court, and that he be prohibited from ever again acting as a legal practitioner of any class in the Punjab."

The appellant, on 10th April, 1908, applied for a review of that order on various grounds, and the judgment of the Court, on that application, delivered by the same learned Judges, on 5th February, 1909, is set out in their Lordships' judgment below.

The appellant, by special leave, appealed to His Majesty in Council against the two orders of the Chief Court.

De Gruyther, K. C. (*G. C. O'Gorman* with him) for the appellant:—If the money had not been paid into Court as ordered, the pre-emption suit would have been dismissed with costs, under S. 214 of the Civil Procedure Code (Act XIV of 1882). The evidence proved that Mussammat Ishar Kaur asked Chanda Singh to pay the decretal amount and buy the land. There was nothing unprofessional in that, and Chanda Singh did not take any advantage of her. The agreement of 1st February, 1902, was not of an improper kind. Legal practitioners were, under S. 28 of the Legal Practitioners' Act (XVIII of 1879), allowed to take agreements of that kind from their clients, and that agreement could not be produced, because it was returned, as the evidence showed, to Mussammat Ishar Kaur. The findings of fact were against the weight of evidence. Chanda Singh was punished for cheating his client. But there was no charge of cheating framed against him. None of the charges on record could cover the charge of cheating. Further, there was no independent inquiry as required under the Legal Practitioners' Act. The orders appealed against ought to be set aside. Reference was made to P. R. (1894) No. 111, and Rule XIII of the Punjab Chief Court Rules made under the Legal Practitioners' Act (XVIII of 1879).

A few days after the hearing of the appeal their Lordships intimated that they would advise His Majesty that the appeal should be dismissed.

The reasons for their Lordships' Report were delivered by

Sir Arthur Wilson.—Their Lordships have already intimated that they would humbly advise His Majesty that this appeal should be dismissed. It remains now to state the reasons which have led their Lordships to tender that advice.

The appeal is against two orders of the Chief Court of the Punjab dated 16th March, 1908, and 5th February, 1909. By the first of these orders, the Chief Court removed the present appellant permanently from the list of pleaders entitled to practise on the ground of professional misconduct. By the second order, the Court reviewed its former decision, and reduced the penalty imposed upon the appellant to suspension from practice for a period of three years.

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The material facts are not in doubt in their Lordships opinion. The appellant acted as pleader in a pre-emption suit first for one Partab Singh, and after the death of the latter, for his minor son, Harbans Singh, who was under the guardianship of his mother Mussammat Ishar Kaur. He was said to have taken advantage of that position of trust in order to cheat his client out of the subject-matter of the suit and obtain it for himself.

It is unnecessary, in their Lordships' opinion, to examine in detail the various proceedings which took place before the Chief Court in connection with this matter. It is enough to say briefly that the attention of the Court having been called to the conduct of the appellant an explanation was called for from him and a formal enquiry ordered. The charges against him were embodied in a document printed in the record. Those charges are not perhaps very formally drawn, but, as will be seen, the substance of what was imputed to the appellant was perfectly well understood by all parties. In the judgment of the Court, dealing in the first instance with the charges, their substance and effect were thus stated: " We think the extreme impropriety of the conduct of this pleader is established. He has made false and contradictory statements on matters of fact, and these false statements must have been made in bad faith. He entered into an improper agreement with one client. When that client died, leaving a minor son with a mother as guardian, Chanda Singh, taking improper advantage of the position, plotted to secure for himself the benefit of the litigation, and to further his aims he made a tool of the minor's next friend * * * getting him to make applications in his favor and to write collusive letters pretending that Mussammat Ishar Kaur was agreeable to Chanda Singh's taking the benefit of the litigation." On this finding was based the Order of the 16th March, 1908.

The appellant presented a petition asking for a review of the last mentioned order.

What took place when that petition came on for hearing is recorded in the Order of the Court dated 5th February, 1909, as follows:—

An application has been made for a reconsideration of our Order dated 16th March, 1908, which directed that the name of Chanda

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Singh be struck off the roll of pleaders of this Court. Many reasons for a review of our judgment have been put forward in the application submitted by Mr. Kharak Singh, but all that is now pressed upon us is that Chanda Singh has already suffered a very severe punishment; that he has been deprived of his means of livelihood; that the principles involved in our Order and the necessity for the maintenance of purity in their transaction by pleaders in dealing with their clients has been sufficiently vindicated; and that the order may now be rescinded and Chanda Singh be restored to the roll as an act of grace. Chanda Singh has, through his pleader, expressed sincere contrition for passed lapses and a determination to act in future in a manner to satisfy the requirements of probity and uprightness in the exercise of his profession.

It was with feelings of much pain and regret that we passed an Order striking Chanda Singh's name permanently off the list of pleaders. It is always much pleasanter to show mercy than severity. But we cannot disguise from ourselves that the offence committed by Chanda Singh was a very serious one indeed. We do not think that the sentence passed was in any way too severe. It is only because Chanda Singh is a blind man and therefore incapacitated altogether from earning his livelihood otherwise, that we find ourselves prepared to consider his application for mercy at all, and even now we feel that it would not be consistent with our duty to make the sentence in any way light. Seeing, however, that Chanda Singh is a blind man, that he has expressed deep contrtion, and made promises of amendment, we think that we are justified in recommending that his sentence be reduced to one of suspension for three years from the date of our Order dated 16th March 1908, and if the learned Chief Judge agrees to that course (Rules Regulating Enquiries into the Conduct of Legal Practitioners, Rule 3), we propose to pass an order modifying our previous one and directing that Chanda Singh be suspended for three years from 16th Mareh 1908, *i.e.*, until 16th March 1911.

The facts are also stated in the remarks of the learned Judges of the Chief Court with reference to the present Appeal.

Having mentioned the petition for review presented by Chanda Singh, the learned Judges proceed to say:—"That petition was admitted to a hearing by a Division Bench by an order of a Judge in chambers, dated 10th October, 1908, and the Judges of this Court were prepared to hear arguments, and to

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dispose of that petition on the merits. When the case came up for hearing, however, Chanda Singh himself appeared, accompanied by his counsel, and his counsel specifically stated that Chanda Singh withdrew all the grounds alleged in his petition as grounds for review, admitted that the facts were as found in the Order of this Court of 16th March, 1908, and that he had been guilty of grave professional misconduct". Again they say: "We think it will be agreed on all hands that there can hardly be any misconduct on the part of the legal practitioner more serious than the use of the position in which he stands to his client, to the disadvantage of the client and the advantage of himself We found on the facts, and this was admitted by Chanda Singh on the 5th February, 1909, explicitly before us, that Chanda Singh in plain English has used his position as legal adviser to Mussammat Ishar Kaur to cheat her in respect of the property in suit."

From what has been quoted, there can be no doubt that the appellant, and his counsel on his behalf, deliberately admitted the charges made against him in the sense in which those charges were understood by the learned Judges. That being so, it appears to their Lordships that the learned Judges had ample justification for the orders appealed against, and that the latter of those two orders went as far in the direction of mercy as it properly could go.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present :—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Udai Raj Singh and others .. Appellants *

v.

Raja Bhagwan Bakhsh Singh and others .. Respondents.

Udai Raj Singh v. Bhagwan Bakhsh Singh.

Oudh Estates Act (I of 1869), Ss. 13, 16 and 17—Immovable property—Gift inter vivos—Ambiguous instrument—Construction.

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* 1909 30th November, 1st and 2nd December and 15th February 1910.

Held, that immovable property in Oudh is not transferable by gift *inter vivos* otherwise than by a registered deed : that there is no contradiction in Ss. 16 and 13 of the Oudh Estates Act (I of 1869) ; that a gift in contravention of S. 16 is not valid in case the object of the gift is exempt from the operation of S. 13, and the gift, therefore, is subject to the additional fetter imposed by that section ; and that a deed of gift must be registered as required by S. 17 of that Act.

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In ascertaining the meaning and effect of an instrument, dated the 5th of May, 1887, which was neither very clear nor altogether intelligible, their Lordships looked at the matter broadly and agreed with the lower appellate Court in holding that it was testamentary and could not be construed as a gift *inter vivos*.

Appeal by special leave from a judgment and decree of the Court of the Judicial Commissioner of Oudh (November 27, 1906), affirming a judgment and decree of the Court of the Subordinate Judge of Lucknow (March 29, 1905).

The questions for decision were (1) the validity of the transfer of an estate by an oral gift under the Oudh Estates Act (I of 1869) and (2) the proper construction of a document, dated 5th May, 1887, and executed by one Raja Madho Singh.

The matter in dispute was the right of succession to the Amethi Taluqa, in the Sultanpur District of the Province of Oudh. The said Raja Madho Singh was the Taluqdar. His name was entered in Lists I and II prepared under the provisions of S. 8 of Act I of 1869.

On June 1, 1878, Raja Madho Singh executed a deed of gift of the said Taluqa (with the exception of certain muafi villages, and certain villages, which were 'endowed for the temple by means of a registered document') in favour of one Sarabjit Singh. The gift was liable to defeasance in the event of the birth of a son to the donor, and was made subject to the payment of certain sums annually to the donor and his wives for their respective lives.

On May 26, 1883, Madho Singh executed a 'deed of will and adoption' stating that he had adopted one Lachhman Singh, who was to succeed him in case he left no natural born son ; that in case he left a natural born son, Lachhman Singh was to get a maintenance allowance ; and that the deed of June 1, 1878, executed in favour of Sarabjit Singh, should, with his consent and acquiescence, be considered null and cancelled.

On May 29, 1883, Sarabjit Singh executed a deed of relinquishment in favour of Madho Singh declaring that he (Sarabjit

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Singh) approved of the adoption of Lachhman Singh, who was adopted by Madho Singh at Sarabjit Singh's instance, and that Sarabjit relinquished the property and rights thereto acquired by him under the deed of June 1, 1878.

On March 29, 1886, Madho Singh applied for mutation of names in respect of the Amethi Taluqa (with the exception of muafi and the endowed villages) in favour of his adopted son Lachhman Singh, and prayed "that in place of the applicant's name that of the said Lal Lachhman Singh be substituted in the Revenue papers; and that so long as Lal Lachhman Singh does not complete 21 years of age, the management of the estate be under the supervision and *sar-barah-kari* (*lit.*, the conduct of business in partnership) and guardianship of the applicant. If, God forbid, for any *khud-ikhtiari* (*i.e.*, depending on one's own will or power) and *ba-ikhtiari* (*i.e.*, not depending on one's will or power) and *qudrati* (natural) reasons Lal Lachhman Singh's connection with the estate be severed during the life-time of the applicant then the whole estate would revert *badastur* (*lit.*, according to custom) to the applicant—in the same state in which it was when no adoption and no *dakhil-kharij* had taken place; and the present *dakhil-kharij* and the deed of adoption would be no bar (*khalal-andaz*), nor be injurious, to the interest (haq) of the applicant." Mutation of names was accordingly effected. Subsequently on December 18, 1886, mutation of names in respect of the muafi villages took place on a supplementary application by Madho Singh.

On May 5, 1887, Madho Singh executed a deed, the meaning and effect of which were in dispute on this appeal. The following were its material provisions:—

"Whereas I, Raja Madho Singh, son of Lal Arjun Singh, Rais and Taluqdar of Garh Amethi, &c., resident of Amethi, District Sultanpur, had got a deed written and registered on the 26th of May, 1883, according to which I had appointed, under certain conditions, my adopted son, *barkhurdar* (a term of endearment) *lakht-a-jigar* (lit., a piece of my heart) Lal Lachhman Singh, as my successor (*jae-nashin*) to the whole (of my) property (*jaedad*); and by the same deed had formally (*bazabta*) made a written declaration and completed (the

requirements of) adoption; but after the execution of the said deed, I obtained "relief" (*faraghat hasil kee*) by performing the ceremonies of *janes* (investiture with the sacred thread) and of marriage of the said *barkhurdar*; and after having closely obseved the good behaviour (of the said son): I have obtained every kind of satisfaction. For this reason it has become necessary to amend some of the provisions (*sharaet*) of the above-mentioned document: and therefore I write as follows:—

"*First*, Lal Lachhman Singh, my adopted son, under S. 22, Cl. 5, of Act I of 1869, is, and will be, my permanent successor (*jae-nashin*, lit., *locum tenens*); and with a view to giving no one any loophole (*gunjaish*) for future dispute I have, during my life-time, had *dakhil-kharij* of the *ilaga* made in his (Lal Lachhman Singh's) favour; and have completed the process of putting in my place by the action which I took (*maratib jae-nashini ke bazarie amal-daramad takmil kar diya*)."

Cl. 2, after stating the fact of the adoption of Lachhman Singh, concluded that "under this deed Lal Lachhman Singh, in the existing circumstances, shall be considered and acknowledged, in accordance with the intention of Act I of 1869, as a permanent (*mustagil*) and perfect (mukammal) successor and adopted son; and no one's claim for any article, or any office, or any dignity (*laquab*), or for any right against the said successor, in respect of any property or right of mine, will be worthy of consideration.

Cl. 3, stated that in the event of a son being born to the executant from legitimate union, the executant could, if he so wished, revoke the provisions of the present deed. Clauses 4 and 5 referred to certain provisions made for expenses of some temples.

"*Sixthly*, the instrument, dated 1st June, 1878, which I had executed, in the interests of management (*intizam*) and expediency (*mashaltan*), in favour of Babu Sarabjit Singh, Taluqdar of Tikari, in whose favour *dakhil kharij* was also made: I have had it (the said instrument), after taking it back, with our mutual consent, from the said Babu Sahib, annulled, destroyed and cancelled; and the said Babu Sahib, after absolutely relinquishing that (*us*) right, and after revocation of the

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gift, again put me in possession of the property mentioned in the said instrument; and the said Babu Sahib, after getting his name expunged from the Revenue Registers, had published the fact of the relinquishment by him; and (moreover) executed and registered a deed of agreement, dated 29th May 1883, on a fully stamped paper; and after getting possession I made over (*hawala kiya*) the whole of the said property to my adopted son and permanent successor, *barkhurdar* Lal Lachhman Singh, in virtue of being my representative (*qaim muqami khud*), and I delivered possession to him and caused my own name to be removed from the Government office and that of the said *barkhurdar* to be formally substituted; and, as against the said *barkhurdar*, I have absolutely and unconditionally relinquished all rights (*kaquq*) and proprietorship (*milkiyat*) as well as ceased interference (*madakhlat*) with the property (*jaedad*). Therefore, neither Sarabjit Singh himself nor his representatives have any right left to make a claim under the deed of 1st June, 1878."

Cl. 7 provided that as Lachhman Singh was regarded as the executant's natural son he had become, and would become, the executant's full and permanent successor, and he was to exercise forethought in the management of the property and pay an allowance of Rs. 2,000 to the executant's Rani.

" *Eighthly*, the stipulations (*sharait*) of the deed of May 26, 1883, so far as they are inconsistent with this last deed are hereby (lit., by this instrument) amended; but there shall be no change in the essential facts (*amar*, lit., fact), namely, the fact of appointment as successor to the property and the fact of adoption, which have been accomplished from before (*pahle se ho chuka hai*); and Lal Lachhman Sigh will be—as my adopted son and donee (*mauhublahu*) and legatee (*musilahu*) under the deed, dated 26th May, 1883, as well as under this deed—(my) full (*mukammal*) successor, and will be entitled to all rights—legal, customary and *shastric*—in respect of all my movable and immovable property, which has already been acquired, or which may be acquired hereafter during my life-time, or which may come to me by inheritance, or to which I may become entitled."

Lachhman Singh died on April 12, 1891, during the lifetime of his adoptive father, leaving a widow, Punpal Kunwar, and his adoptive mother, Ajit Kanwar.

On April 30, 1891, Madho Singh, applied for the re-instatement of his own name, and on June 10, 1891, the final order of the Revenue Court was made in terms following:—

"The applicant's name as real proprietor, be as before entered in place of Lal Lachhman Singh, deceased, in Registers Nos. 2 and 3 on the basis of possession."

On May, 1891, Madho Singh executed a will leaving his property to Raja Bhagwan Bakhsh Singh, the first respondent. Madho Singh died on August 24, 1891, and the first respondent had been in possession of the property ever since Madho Singh's death.

On August 22, 1903, Gur Bakhsh Singh and his co-plaintiffs, who were his assignees, instituted the present suit in the Court of the Subordinate Judge of Lucknow against Raja Bhagwan Baksh Singh and others, who were claimants to the property in suit, for recovery of possession of the said Taluqa and other property left by Madho Singh. The plaint alleged that in 1883 Madho Singh adopted Lachhman Singh, and in 1888 placed him in possession of the estate after having mutation of names made in his favour, that on May 5, 1887, Madho Singh executed a document by which he effected a complete transfer of the Taluqa to Lachhman Singh, who remained in proprietary possession of the properties in suit until his death on April 12, 1891; that Lachhman Singh died intestate and without issue and his widow Punpal Kunwar succeeded to a life estate, that Punpal Kunwar died on August 10, 1893, and was succeeded by his adoptive mother, Ajit Kunwar, who died on December 17, 1893; that on the opening out of the succession on the death of Ajit Kunwar, Babu Prag Prasad, the father of the first plaintiff Gur Bakhsh Singh, became entitled to the said Taluqa, and on his death in 1894, his rights passed to the said plaintiff, who was represented on this appeal by his son, Babu Udai Raj Singh, and that after December 17, 1893, the date of the death of Ajit Kunwar, the first respondent had been in wrongful possession of the properties in suit.

The first respondent by his written statement claimed the property under Madho Singh's will, dated the 1st of May, 1891, and pleaded that no oral gift, as alleged, had ever been

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made by Madho Singh to Lachhman Singh, that such a gift if made, was invalid in law, and that the deed of may 5, 1887, was incapable of being construed as a deed of gift *inter vivos* in favour of Lachhman Singh.

Only such facts and pleadings as are necessary for the purpose of this report are set out here. The Subordinate Judge decided that Madho Singh during his life-time did, as a matter of fact, transfer his estate to Lachhman Singh, who continued in possession till his death in April 1891, but, he held that it was a conditional transfer and also an invalid one under S. 16 of Act I of 1869, as well as under S. 123 of the Transfer o Property Act (IV of 1882) as it was not made by an instrument in writing. With regard to the deed of May 5, 1887, he found that, as it was not duly stamped, it did not constitute a valid transfer in favour of Lachhman Singh. In that view of the matter he observed that it was not necessary to consider whether the terms of the deed showed it to be a deed of transfer, as was contended by the appellants, or only a deed of adoption and will, as was contended on behalf of the principal respondent. In the result the Subordinate Judge made a decree dismissing the suit with costs.

The appellants' appeal to the Court of the Judicial Commissioner of Oudh was dismissed with costs. The Court declined to consider whether an oral transfer of the estate by Raja Madho Singh had or had not been made, being of opinion that under Act I of 1869, a registered document was required to effect a transfer of Madho Singh's property to Lachhman Singh, and held that the deed of May 5, 1887 was not, and was intended to be, a deed of gift but was a testamentary instrument.

Leave to appeal to his Majesty in Council was refused by the Appellate Court, and thereafter special leave to appeal was obtained by the appellants.

Sir Robert Finlay, K. C., and *G.E.A. Ross*, for the appellants—referred to S. 2 (*a*) of the Transfer of Property Act (IV of 1882) and submitted that Act I of 1869 was not expressly rerepealed by the former Act, and, therefore, S. 123 of that Act did not apply here. The case is governed by Act I of 1869 Ss. 13 and 16 of which, read together, require an instrument in

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writing to transfer immovable property by gift *inter vivos* in the case of persons, who do not come within the privileged class mentioned in S. 13. Lachhman Singh was a privileged person within the meaning of that section, and the transfer of the estate to him in 1886 was valid: Compendinm of Oudh Talukdari Law, by J. G. W. Sykes, Ed. 1886, pp. 263, 264, and 265; *Hurpurshad* v. *Sheo Dyal*[1] and *Thakur Sheri Bahadur Singh* v. *Thakurain Dario Kuar*.[2] Reference was also made to S. 11, 12, 14, 15, 17, 18 and 22 of Act I of 1869; and *Thakurani Chhabraj Kunwar* v. *Babu Gopal Lal*.[3]

Sir Arthur Wilson: This Board has considered S. 14 of Act I pf 1869.

Sir Robert Finlay.—Ss 13 and 14 of that Act were considered in *Thakurain Balraj Kunwar* v. *Rai Jagatpal Singh*[4] but the point now raised was not decided there.

As regards the meaning and effect of the document of May 5, 1887 the document should be read as a whole: *Labit Mohan Singh Roy* v. *Chukkun Lal Roy*[5] *Mussammat Surajmani* v. *Rabi Nath Ojha*[6] and *Pallikalagatha Marcar* v. *J. G. Sigg.*[7] That deed operated as a gift *inter vivos* particularly, having regard to the concluding part of Cl. 6 in it. If the appellants are right in their contention, the other questions do not arise and the appeal must be allowed.

De Gruyther K. C., (*M. Nehru* and *B. Dube* with him), for the first respondent.—The appellants claim as heirs of Lachhman Singh, and it is for them to establish, in order to succeed, that he at one time or another had an absolute estate of inheritance: *Narindar Bahadur Singh* v. *Achal Ram*[8]. The evidence shows that he never enjoyed such an estate.

Immoveable property inOudh is not transferable by an oral gift. A registered deed is necessary for that purpose. The last paragraph of S. 13 of Act. I of 1869 adds a further condition to those laid down in S. 16 and 17 of that Act. These sections are not contradictory. Act I of 1869 governs the case,

1. (1876) L. R. 3 I. A. 259, 277.
2. (1877) I.L.R. 3 C. 645. 651 (P. C.)
3. 9 Oudh Cases p. 113.
4. (1904) I.L.R. 26 A. 393 (P.C.)
5. (1897) I.L.R. 24 C. 834 (P. C.)
6. (1907) I.L.R. 30 A. 84 (P. C.)
7. (1880) I.L.R. 2 M. 239.
8. (1893) I. L. R. 20 C. 649 (P. C.)

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and an oral gift is void under it. But if it is contended that that Act does not apply here, the Transfer of Property Act (IV of 1882) must govern the case, and an oral gift is void under S. 123 of that Act. The other side relies upon *Hurpurshad* v. *Sheo Dyal* [1] and *Thakur Shere Bahadur Singh* v. *Thakurain Dario Kuar* [2], but the deeds there were executed prior to the passing of Act I of 1869.

The lower Courts were right in holding that the deed of May 5, 1887, was of a testamentary character, and did not operate as a deed of gift *inter vivos*. The Registrar treated it as a will by entering it in Register No. 3. If it had been a deed, it would have been entered in Register No. 2 under the Indian Registration Act. *Fanindra Deb Raikat* v. *Rajeshwar Das* [3]; *Thakur Ishri Singh* v. *Baldeo Singh* [4], and Act I of 1869, S. 22 (4) and (5) were referred to.

Sir Robert Finlay, K. C., replied.

The judgment of their Lordships was delivered by

Lord Macnaghten :—This is an appeal from the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Lucknow.

The matter in controversy is the right of succession to the Amethi Taluqa in the Sultanpur District of the Province of Oudh, formerly the property of Rajah Madho Singh deceased, whose name appears in Lists I and II mentioned in S. 8 of the Oudh Estates Act (Act I of 1869).

Madho Singh died on the 24th of August, 1891. Under his will dated the 1st of May, 1891, the respondent Bhagwan Baksh Singh has been in possession ever since Madho Singh's death.

The respondents title is challenged by the first appellant Babu Udai Raj Singh, representing the late plaintiff Gur Baksh Singh.

The claimant Gur Baksh Singh deduced his title from one Lal Lachhman Singh who was adopted by Madho Singh but died on the 12th of April 1891 in the life-time of his adoptive father.

1. (1876) L. R. 3 I. A., 259, 277.
2. (1877) I. L. R. 3 C. 645, 651 (P. C.)
3. (1885) I. L. R. 11 C. 463 (P. C.)
4. (1884) I. L. R. 10 C. 792 (P. C.)

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His case was that Madho Singh in his lifetime made over the estate to Lachhman Singh in one or other of two ways either by a verbal gift to be inferred from Madho Singh's conduct and the circumstances of the case or by a registered instrument which is dated the 5th of May, 1887, and was intended, it is said, to take effect as an immediate transfer.

The cause of action as alleged by the claimant accrued on the death of Madho Singh's widow, Lachhman Singh's adoptive mother, on the 17th of December, 1893. But the suit was not instituted until the 22nd of August, 1903.

At the trial there was a great mass of evidence on issues not material on this appeal.

The appeal which was allowed by special leave, is confined to two questions:—

1. Is immoveable property in Oudh transferable by gift *inter vivos* otherwise than by a registered deed?

2. What is the meaning and effect of the instrument dated the 5th of May 1887?

The Subordinate Judge, though he rejected as untrustworthy the testimony of a large body of witnesses who deposed to the fact of a verbal gift, thought there must have been a gift of that sort but he held the gift invalid having regard to the provisions of the Act of 1869. The Court of the Judicial Commissioner declined to go into the question of a verbal gift, holding that no transfer by way of gift could be effected otherwise than by a registered deed.

The point is too clear for argument. S. 16 of the Act of 1869 enacts that transfer—a term which is defined in the Act as "an alienation *inter vivos*"—made by a Taluqdar shall be invalid unless made by an instrument in writing and attested by two or more witnesses. S. 17 requires, as a condition of the validity of a deed of *gift*, registration within one month from the date of the execution of the instrument. It was suggested in the course of the argument that this provision does not apply to a gift to a person in the position of an adopted son because S. 13, which is to be found in the preceding Chapter of the Act headed "Powers of taluqdars and grantees to transfer and bequeath," enacts that no taluqdar shall have power to give his estate to a

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person not being a member of a designated class (which includes an adopted son) except by an instrument executed not less than three months before the death of the donor and attested and registered as therein mentioned. It is difficult to discover any contradiction in these sections or to understand how it can be argued that a gift in contravention of S. 16 may be valid in case the object of the gift is exempt from the operation of S. 13 and the gift therefore is not subject to the additional fetter imposed by that section.

The question as to the meaning and effect of the deed of the 5th May, 1887, is rather more difficult.

The circumstances which led up to the execution of that instrument are as follows :—

On the 1st of June 1878 by a registered deed of that date, Madho Singh made over the Amethi Taluqa with the exception of certain muafi villages and certain villages dedicated to the endowment of a temple at Benares to one Sarabjit Singh subject to certain conditions and provisions.

On the 26th of May, 1883, Madho Singh executed a will stating that he had adopted Luchhman Singh and giving him the entire taluqa but making provision for the event of his leaving a natural born son.

On the 29th of May, 1883, Sarabjit Singh executed a registered deed stating that he had relinquished the property and all proprietary rights acquired by him under the deed of gift of the 1st of June, 1878, in favor of Madho Singh and declaring that the adoption of Luchhman Singh had been made at his instance.

On the 28th of April, 1886, Madho Singh, effected mutation of names in respect of the Amethi Taluqa (except the muafi villages and the villages dedicated to the endowment of the temple at Benares) in favor of Luchhman Singh on an application which stated that if Luchhman Singh's connection with the estate should be severed during Madho Singh's lifetime then the whole estate would revert to him. Mutation of names in the case of the muafi villages followed on a supplementary application by Madho Singh.

On the 5th of May, 1887, Madho Singh executed the instrument which has given rise to the present question. The docu-

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ment is not very clear, nor is it altogether intelligible. In the last paragraph Madho Singh declares that he had written the deed "by way of a deed of adoption and codicil to a will in order to amend and rectify the deed of 6th May, 1883, by adding some necessary provisions to it." The deed in the main is clearly testamentary in its character, but there are two paragraphs which gave some color to the plaintiff's claim. The first five paragraphs have no material bearing on the present question. Paragraph 6 begins by stating that he (Madho Singh) had had the instrument of the 1st of June, 1878, which he had executed in favor of Sarabjit Singh, cancelled and destroyed with the consent of Sarabjit Singh, and Sarabjit Singh had again put him in possession of the estate. Madho Singh then declares that, after getting possession, he had made over the whole of the said property to his adopted son, and had absolutely and unconditionally relinquished all rights and proprietorship, as well as ceased interference with the property, and he concludes the paragraph by saying: "therefore neither Sarabjit Singh himself nor his representatives have any right left to make a claim under the deed of 1st of June 1878." In Cl. 8 Madho Singh describes Luchhman Singh as "my adopted son and donee and legatee under the deed dated the 26th of May, 1885, as well as under this deed * * * in respect of all my moveable and immoveable property which has already been acquired, or which may be acquired hereafter during my life-time or which may come to me by inheritance or to which I may become entitled."

Madho Singh's object in putting on record the statement contained in paragraph 6, probably, was to make the position of Luchhman Singh secure against the interference of certain relatives with whom, it is said, he had a blood feud, one of whom might possibly claim under Sarabjit Singh. Paragraph 8 carries the matter no further. In styling Luchhman Singh "donee" the document refers simply to what was given to him by the will and codicil.

Looking at the matter broadly their Lordships agree with the learned Judges in the Court of the Judicial Commissioner in holding that the instrument of the 5th of May, 1887, was testamentary and cannot be construed as a deed of gift *inter vivos*.

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Their Lordships will, therefore, humbly advise His Majesty that the appeal must be dismissed.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for appellants: Messrs. *Barrow, Roger and Nevill.*

Solicitors for first respondent: Messrs. *Ranken Ford, Ford and Chester.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Present:—Lord Macnaghten, Lord Collins and Sir Arthur Wilson.

Kanhaya Lal .. .. Appellant*

v.

The National Bank of India, Ltd., Delhi .. Respondent.

anhaya Lal v. National Bank India Ltd.

Suit for two claims—Decision on one of them and dismissal of the same—Refusal to draw up decree in respect of the dismissed claim—Dismissal of the whole case for default—Civil Procedure Code (Act XIV of 1882) S, 102., order under—Practice—Remand—Questions which could be dealt with by the Court to which the case was remanded.

The plaintiff sued the defendant in the District Court for two things—first for a decree for the amount which he had paid to release certain property from attachment, and secondly, for damages on the ground of the illegality of the attachment. The District Judge held the plaintiff's principal claim relating to the sum paid to release the attachment was unsustainable in law, and dismissed the case for recovery with costs, directing that "the case will proceed on the question of damages for illegal attachment." The District Judge refused the plaintiff's application that a decree might be drawn up embodying the dismissal of his claim for the money paid. The claim for damages proceeded, but eventually the plaintiff absolutely withdrew from it, but not from the claim for the recovery of the money paid. In the result the District Judge dismissed the whole case for default under S. 102 of the Civil Procedure Code (Act XIV of 1882). The Chief Court, on appeal, held, by a majority, that the suit having been dismissed under S. 102, C. P. C. no appeal lay.

Held, that as to the principal claim of the plaintiff, that relating to the money paid to release the attachment, there was in substance a clear decision of the District Judge adverse to the plaintiff; after which, in substance, no question as to that claim remained open in his Court; that as to the second claim, that for damages, the plaintiff having unconditionally abandoned his claim, there remained nothing in substance to be tried; that the case was one not proper to be dealt with under S. 102 of the Civil Procedure Code; and that the case should go back to the Chief Court to decide the appeal upon its merits.

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* 1909 November, 11, 12 and 16, and 1910, March 9.

Held, also, that when a case was sent back to the lower appellate Court to decide the appeal on its merits, it was undesirable to express any opinion on such matters as could be dealt with by the said Court when considering the case on the merits.

Kanhaya Lal v. National Bank of India, Ltd.

Appeal from a judgment and decree of the Chief Court of the Punjab (March 16, 1907), affirming an order and decree of the District Judge, Delhi (May 26, 1903).

The questions raised on the appeal were :—

(1) Whether the payment of money, under the circumstances hereinafter set out, by the appellant, in order to release his property, which had been attached in execution of a decree obtained by the respondent against a third party, amounted in law to a payment under compulsion or not?

(2) Whether the appellant, whose main claim on one cause of action had been dismissed with costs on the merits, and who had withdrawn his claim as to a second cause of action joined in the same suit, was entitled to have a decree passed on that part of his suit so dismissed in order that he may appeal therefrom?

(3) Whether an appeal lies from an order dismissing a suit under S. 102 of the Civil Procedure Code (Act XIV of 1882)?

On April 21, 1902, in the case of the *National Bank of India Limited*, (hereinafter called the Bank), v. The *Delhi Cotton Mills Company, Limited*, the Chief Court of the Punjab passed, on appeal, a money decree in favour of the Bank for Rs. 97,506-12-2 with interest thereon at the rate of 6 per cent per annum from the date of suit till payment.

On June 25, 1902, the premises and Mills of the said Delhi Cotton Mills Company, Limited, were purchased as a going concern by the appellant at a public auction for Rs. 5,02,000.

On August 15, 1902, the Bank, in execution of their decree of April 21, 1902, applied to the District Judge, Delhi, for a warrant of attachment of the said premises and Mills, and the warrant was thereupon issued. In compliance with that warrant, the bailiff, accompanied by the manager of the Bank, notwithstanding the objections and protests of the appellant's servants, entered upon and took possession of the said premises and Mills on or about August 20, 1902.

On August 27, 1902, the appellant filed a petition in the District Court, Delhi, stating that the appellant was the owner

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of the premises and Mills attached, that such attachment was wrongful, that by such attachment the appellant had been prevented from making the necessary arrangements for working the Mills, and that such attachment "has caused him, and is likely "to cause him, considerable loss, loss which he will be quite un-"able to prove to its full extent, and is compelled to pay the "balance of the decree of the Bank against the Delhi Cotton Mills "Company, Limited, and he" hereby produces the money for such purpose under protest. The appellant thereupon paid the money, viz., Rs. 83,005 into Court, obtaining at the same time an order from the District Judge releasing the property from attachment

On the next day, *viz.*, August 28, 1902, the appellant instituted the present suit against the respondent in the District Court, Delhi. In the plaint, after setting out the above facts, the appellant asked for a decree :—

(1) For the return of the sum of Rs. 83,005, paid in as above, together with Rs. 27-8-3, interest for one day at 12 per cent, in all Rs. 83,032,8-4, with interest thereon at the samerate till realisation from the Bank.

(2) For Rs. 10,000 damages for trespass and illegal attachment.

The respondent filed his preliminary and further pleas, whereupon on October 27, 1902, the District Judge framed the following preliminary issues :—

(1) Will the suit as framed not lie?

(2) Is there no such privity between the plaintiff and the defendant as to give the former a cause of action against the defendant?

(3) Does the payment, accepting the statement that, as a matter of fact, the payment was made by the plaintiff to protect his own property, amount at law, since the payment was in execution of a decree, to a payment on behalf of the judgment-debtor, and if so, has the plaintiff no remedy against the defendant?

(4) Do the circumstances of the payment, accepting the plaintiff's statement as true, not entitle the plaintiff to recover?

(5) Is there misjoinder of causes of action in the claim to recover money and damages?

On the same date the Delhi Cotton Mills Company, Limited, applied to be joined as a party to the suit.

On November 11, 1902, the arguments on the preliminary issues were heard, and on November 18, 1902, the District Judge made an order holding that in so far as the claim for recovery of the sum paid by the appellant to the respondent on account of the decree against the Delhi Cotton Mills Company, Limited, was concerned, the same, on the allegations contained in the plaint, constituted a voluntary payment, and was not recoverable as such in the present suit; and he dismissed that portion of the claim, but directed that the case should proceed on the question of damages for the alleged illegal attachment.

On November 28, 1902, the District Judge made an order holding *inter alia* that there was no necessity to add the Delhi Cotton Mills Company, Limited, as a party to the suit. On the same date as the claim for damages still remained undisposed of, the appellant filed his reply to the respondent's pleas, traversing and joining issue thereon.

On December 3, 1902, the appellant filed a petition praying that a decree might be drawn up in accordance with the order of November 18, 1902, dismissing the appellant's claim for recovery of money paid into Court. The District Judge, by his order, dated December 20, 1902, dismissed that petition, expressing himself as follows:—

"Mr. Kirkpatrick applies that a decree should be drawn up in the ordinary form in accordance with my order dismissing the claim for recovery with costs. This, I think, is at this stage unnecessary, as the final order in the case is the one on which the decree will be based, and the meaning of the order passed is that the claim for recovery is disallowed with costs rather than that the case is dismissed. The period for appeal will accordingly run in respect to that order from the date of the final order, and Mr. Grey undertakes not to raise this point of limitation on such appeal."

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The appellant thereafter applied for a review of the order, dated November 18, 1902, but the District Judge dismissed that application.

On March 21, 1903, the District Judge framed issues in respect of the claim which remained to be tried.

On the 16th and 17th April, 1903, oral and documentary evidence was given on behalf of both parties, and the case was then adjourned to a subsequent day.

On May 25, 1903, the appellant filed a petition, praying that he might be allowed to withdraw from his claim for damages, under S. 373 of the Civil Procedure Code (Act XIV of 1882), and further, that a decree might be drawn up on the part of the claim dismissed. The District Judge refused the applications. Thereupon the appellant's pleader stated that his client unconditionally withdrew from his claim for damages, but not from that for the recovery of money. The respondent then applied to the Court for leave to call his witnesses and give evidence on all the issues. Upon that being granted the appellant said that he ceased to appear in the case. The District Judge then adjourned the case till the next day, informing the appellant at the same time that if he desired to proceed with the case on the next day he would be allowed to do so. On the next day, *viz.*, May 26, 1903, as the appellant said that he was not appearing in the case, the District Judge made an order dismissing the same with costs under S. 102 of the Civil Procednre Code.

Against the decree of the District Judge the appellant appealed to the Chief Court of the Punjab. The appeal came on for hearing before a Division Bench of that Court, and, on an objection being taken on behalf of the respondent that no appeal lay from an order made under S. 102 of the Civil Procedure Code dismissing a suit in default of plaintiff's appearance, the plaint was referred to a Full Bench of the Chief Court, for decision. On June 8, 1906, it was held by a majority of the Full Bench, that no appeal lay in such a case, two of the learned Judges having held that an appeal did lie, and three, that it did not. On the case coming before the Division Bench, the appellant applied to the Bench to treat the Memorandum of Appeal as a Petition for Review under S. 74 of the Punjab

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Courts Act, 1884. After hearing arguments the Court declined so to treat it, and dismissed the appeal with costs on March 16, 1907.

The appellant, then, appealed to His Majesty in Council.

Sir Robert Finlay, K. C., and *De Gruyther*, K. C. (*G. C. O'Gorman*, with them), for the appellant, referred to the Indian Contract Act (IX of 1872), Ss. 15 69, 70 & 72, and submitted that money paid under the circumstances of this case was not a voluntary payment. It was a payment made under compulsion of law—*Fatima Khatoon Chowdrain* v. *Mahomed Jan Chowdry*[1] and *Dulichand* v. *Ram Kishen Sing*[2]. The appellant is entitled to recover the amount as paid.

There were two separate causes of action and two separate claims. The main claim of the appellant, the recovery of the amount paid to release attachment, was finally disposed of by the order of November 18 1902, and if a decree had been passed in accordance with that order, the appellant would have had an undoubted right of appeal to the Chief Court. On May 26, 1903, when the District Judge dismissed the whole suit for default under S. 102 of the Civil Procedure Code (Act XIV of 1882), the only claim before the Court was that relating to damages. On the appellant withdrawing from his claim for damages (while expressly reserving his rights in his claim for recovery, already finally disposed of by the order of November 18, 1902), the District Judge ought to have dismissed the appellant's suit. The fact that the appellant abstained from attending the taking of evidence on behalf of the respondent in a claim from which he (the appellant) had withdrawn, did not constitute such a non-appearance of the appellant as to justify the District Judge in dismissing the whole suit under the said section of the said Code. Reference was made to the Civil Procedure Code (Act XIV of 1882), Ss. 2 ('decree'), 146, 154, 103, 204 & 273.

Having regard to the Punjab Courts Act XVIII of 1884), S. 70, as amended by Act XXV of 1899, S. 6, which gives the Chief Court powers conferred upon the High Court, under S. 622 of the Civil Procedure Code, the Chief Court ought to have considered the appellant's appeal to that Court on its merits.

Levett. K. C. and *A. M. Dunne* for the respondent:—The appellant by his withdrawal and non-appearance prevented the Judge from taking evidence and going on with the issues raised in the case. Those were issues of fact, and involved the determination of questions of fact affecting the appellant's claim for the

1. (1868) 12 M. I. A. 65, at p, 78.
2. (1881) I. L. R. 7 C. 648. (P.C.)

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recovery of the amount paid to release the attachment. One of the issues related to the appellant's title and the respondent was en-titled to show that the appellant was not the owner of the property. The action of appellant prevented the District Judge from deciding the fact. The District Judge was right in dismissing the whole suit under S. 102 of the C. P. C. There is no appeal from such an order. That order was the only order which the Distict Judge could make. If there is any appeal from that order, it must be under the C. P. C., which allows an appeal in two cases, namely, from a decree under S. 540, and from an order mentioned S. 588. It is an order under S. 102, and there is no appeal from it. It is not a decree as defined in S. 2 of the C. P. C., and, therefore, there could be no appeal under S. 540, C. P.C. If the decision of the issue decided had been sufficient for the decision of the whole suit, the District Judge would have been bound to draw up the decree S. 154, C. P. C. But here the decision of the issue did not dispose of the whole case, and the District Judge was right in not drawing up the decree. A judge has no power to draw up a decrce upon the decision of a preliminary issue unless such an issue disposes of the whole suit. The order of November 18, 1902, was not a judgment pronounced under S. 198 of the C. P. C. In the absence of any pronouncement of a judgment no decree could be drawn up.

They referred to the Indian Contract Act (IX of 1872), Ss. 72 and 16, and submitted that the District Judge was right in holding that the payment made by the appellant was voluntary and was not therefore recoverable.

[*Lord Macnaghten* : Does the definition of 'coercion', given in S. 15, apply to cases except those falling under the Contract Act?]

[*De Gruyther* : Illustration (*b*) to S. 72 of that Act is precisely applicable to the present case. S. 72 is in a chapter that treats of certain relations resembling those created by contract.]

They also referred to *Tarakant Banerje* v. *Puddomoney Dossee* [1]), and Ss. 204 & 157 of the C. P. C.

Sir Robert Finlay, K. C., replied.

The judgment of their Lordships was delivered by

Sir Arthur Wilson.—This appeal has been brought against a judgment and decree of the Chief Court of the Punjab which affirmed the decision of the District Judge of Delhi. The cir-

1. (1866) 10 M. I. A. 476.

cumstances out of which the appeal arises can be briefly stated, and as, in their Lordships' opinion, the case must go back to the Chief Court for further consideration, their Lordships think it desirable to say nothing about the case which is not absolutely necessary.

In the year 1902 a case was pending, in which the National Bank of India was plaintiff and the Delhi Cotton Mills Company, Limited, defendant, and on the 21st April of that year, the Chief Court, on appeal, made a money decree in favour of the Bank for a sum of over Rs. 97,000 and interest. On the 25th June in the same year, the premises and mills of the Cotton Mills Company were purchased, as a going concern, by the present plaintiff, at public auction, for a sum very much larger than the amount of the Bank's decree. On the 15th August in the same year, the Bank, in execution of their decree, obtained an attachment of the premises purchased by the plaintiff, and possession was taken under that attachment. In the same month of August the present plaintiff filed a petition in the District Court, alleging that the attachment was wrongful, and that he was compelled to pay the balance due under the Bank's decree. He paid into Court accordingly and thus released the property from the attachment. On the following day the now plaintiff filed a plaint against the Bank in the District Court, in which plaint he asked for two things—first, for a decree for the amount which he had paid to release the property from attachment, and second, for damages on the ground of the illegality of the attachment.

It is unnecessary to follow in detail the proceedings in the case. It is enough to say that on the 18th November, 1902, the District Court made an order deciding that the principal claim of the plaintiff, namely, that relating to the sum paid to release the attachment, was unsustainable in law. The learned Judge thus expressed himself:—

"I therefore rule that the payment was entirely voluntary, and for plaintiff's own interest, and that his remedy lies under Ss. 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment."

Their Lordships are of opinion that so far as concerns the recovery of the money paid to discharge the attachment, this order of the District Court was a full determination, adverse to the plaintiff, of his claim in that respect. On the 3rd Dec. 1902, the plaintiff petitioned that a decree might be drawn up embodying the dismissal of his claim for the money paid into Court. This petition was dismissed. The claim for damages still remained, and evidence bearing upon it was proceeded with. On the 25th May, 1903, the plaintiff asked to be allowed to withdraw his claim for damages under S. 373 of the C. P. C. (that it to say with liberty to sue again) and again asked that a decree should be drawn up with reference to the claim dismissed. These applications were refused; and thereupon the plaintiff ab-

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solutely withdrew from the claim for damages, but not from that for the recovery of the money paid.

After that the defendant proceeded to give evidence upon all the issues which had been raised, the plaintiff not appearing. In the result the District Judge dismissed the whole case for default, under S. 102 of the Civil Procedure Code.

On appeal to the Chief Court, the majority of the learned Judges of that Court held that the suit having been dismissed under S. 102 of the C.P.C., no appeal lay, and against that decision the present appeal has been brought.

Their Lordships are of opinion that the case should not be allowed to stand as it does now. As to the principal claim of the plaintiff, that relating to the money paid to release the attachment, there was in substance a clear decision of the District Judge adverse to the plaintiff, after which, in substance, no question as to that claim remained open in the Court of First Instance.

As to the second claim, that for damages, the plaintiff having unconditionally abandoned his claim, there remained nothing in substance to be tried.

The case, in their Lordships' opinion, was one not proper to be dealt with under S. 102 of the C.P.C.

Their Lordships are of opinion that it is unnecessary to decide whether an appeal lies against a dismissal regularly made under S. 102, because they think that that section was not applicable to the present case. They think it necessary that the case should go back to the Chief Court to decide the appeal upon its merits.

In the course of the argument, several minor points were raised which it seems desirable to notice. One was with reference to the evidence already taken in the case, and the use to be made of that evidence. A second point was, with reference to the refusal of the first Court to issue a commission. The third was with reference to the refusal of the Court to allow the cross-examination of a learned gentleman who had appeared as counsel in the earlier stages of the case. These are matters upon which it appears undesirable for their Lordships to express any opinion. Such matters can be dealt with by the Chief Court when considering the case on the merits.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court should be discharged with costs, and that the case should be remitted to that Court in order that the appeal to that Court may be heard and decided on its merits, and that the costs incurred in the District Court should abide the result of such appeal. The respondents must pay the costs of this appeal.

Appeal allawed. Case remanded.

Solicitors :— *T. L. Wilson & Co.*, for appellants

Solicitors :—*Sanderson, Adkin, Lee & Eddis* for respondents.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Abdur Rahim.

G. Narasimhulu Chetti and another .. Appellants *
(*Defendants*)

v.

K. Sundara Chariar and another .. Respondents
(*Plaintiffs and legal representative of 1st plaintiff.*)

Narasimhulu Chetti v. Sundara Chariar.

Principal and agent—Power of Attorney to sell immoveable property—Construction—No authority to receive purchase money

Obiter.—A mere general authority to sell immoveable property does not carry with it an implied authority to receive the purchase money.

Appeal from the judgment of Mr. Justice Wallis in O. S. No. 192 of 1906 on the file of this Court.

The facts appear sufficiently from the judgment of *Abdur Rahim* J.

V. Masilamany Pillai for appellants.
A. Krishnasami Aiyar for respondents.

V. Masilamani Pillai for appellant contended :—(1) On the facts proved in the case Devarajulu Naidu had only an authority to negotiate and not to conclude a contract. " To settle everything " simply means to " negotiate," not to enter into a binding contract. *Hamer* v. *Sharp*[1], *The Vale of Neath Colliery Co.* v. *Furness*,[2] *Goodwin* v. *Brind*[3], relied on.

(2) Assuming that Devarajulu Naidu had authority to conclude a contract he had not authority to receive the purchase money—*Mynn* v. *Joliffe*[4], *Viney* v. *Chaplin*[5] (case of a solicitor.

The plaintiff cannot rely on any plea of ratification. There is absolutely no evidence as against the first defendant. The evidence as against the 2n : defendant is suspicious.

* O S. A. No. 39. of 1908. 17th March, 1910.
1. (1874) L.R. 19 Eq. 108.
2. (1876) 45 L.J, Ch. 276.
3. (1868) L. R. 5 C. P. Ex. 99.
4. (1834) 42 R. R. 802.
5. (1858) 27 L.J. Ch. 434.

* I

Narasimhulu Chetti v. Sundara Chariar.

A. Krishnaswami Aiyar for respondents.—(I) The first question is whether Devarajulu was authorized to enter into and conclude a contract on behalf of defendants 2 and 3. It is submitted that he had authority to conclude the contract. In support of this I rely on the following circumstances:—(1) The parting with the title-deeds. (2) The notices referring purchasers to Devarajulu. (3) The representation to the plaintiff by defendants that Devarajulu was to "settle every thing." (4) The subsequent acquiescence of the parties is also evidence of previous consent. See *Blackwood & Wright* on *Agency*, p. 92. Each circumstance by itself may not be conclusive. It is the cumulative effect that has to be considered. The distinction between an authority to "negotiate," "to procure purchasers," and "to conclude a contract" is no doubt well known to law. But the question is: what is the authority in this case? We have not to construe here a written instrument wherein the expression "settle" occurs. A parol authority receives a liberal construction by Courts. See *Bowstead* on *Agency*, p. 71; *Pole* v. *Leask* [1].

If the authority is expressed in ambiguous terms, third parties and their agents are entitled to put their own construction and the principal will be bound thereby. See *Bowstead* on *Agency*, pp. 33, 56. See *Ireland* v. *Livingston* [2].

(II) Assuming that Devarajulu had authority to conclude a contract, had he the authority to receive the purchase money? It is submitted that the authority to receive the purchase money is incidental to an authority to conclude a contract. The case of *Mynne* v. *Joliffe*[3] relied on by the other side does not lay down any general rule. It deals with the case of an auctioneer. It is distinguished on that ground in *Blackwood & Wright* on *Agency*, p. 92, where the proposition above stated is laid down. See also *Capel* v. *Thornton* [4]; *Howard* v. *Chapman*[5]. The statement in *Dart* on *Vendors & Purchasers* is too vague and general and ought not to be accepted.

(III) Assuming that Devarajulu had neither the authority to do the one nor the other, the defendants

1. (1860) 28 Beav. 562.
2. (1872) L.R 5 H.L. 395.
3. (1834) 42 R. R. 802.
4. (1828) 33 R.R. 678.
5. (1831) 34 R.R. 814.

have ratified the act and they cannot now dispute Devarajulu's authority. And on this point the distinction between the case of a person who is already an agent acting outside the scope of his authority and the case of an utter stranger purporting to act on behalf of another person is to be kept in view. See *Blackwood & Wright*, p. 180. In the former cases very little evidence will suffice. Non-repudiation after notice is treated as tantamount to ratification—see *Prince* v. *Clark*[1] (case of a principal not repudiating the purchase of goods); *Fothergill* v. *Phillips*[2] (one of two co-tenants contracting to sell joint property and the other co-tenant not repudiating it); *Bigg* v. *Strong*[3] (case of a son acting in excess of authority; "every additional hour and day operates as an acquiescence"). Here there is not only non-repudiation and delay but there are positive acts on the part of the defendants. The receipt, the execution of the sale deed by one of the defendants, the permission to *D* to receive and retain the purchase money, are more than sufficient evidence of ratification. Referring to Exh. *C* and *E*, the vakil argued that a party cannot rely on a plea of *non est factum* if he knows of what the deed was about—*Howatson* v. *Webb*[4]—and it is not the defendant's case here that there was any misrepresentation.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—The first question which arises for consideration in this appeal is whether the evidence establishes that Mr. Devarajulu Naidu had authority to sell the house in question on behalf of the defendants—an authority to sell either at the price for which he purported to sell it or the best price that could be obtained or at any proper price. In other words, does the evidence establish that he had a general authority to sell the house without a further reference to his clients or principals on whose behalf he purported to be acting? Then there is the further question, which is to a great extent a question of law; as to whether, assuming that the evidence does establish that Mr. Devarajulu Naidu had authority to sell on behalf of certain principals, he had by virtue of that general authority also an authority to receive the purchase

1. (1823) 1 Barn. and Cress 186.
2. (1871) L. R. 6 Ch. Ap. 770.
3. (1857) 65 E.R. 793 at 796.
4. (1907 1 Ch. 537.

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Chief Justice.

money on behalf of the principals so as to bind the principals by that receipt.

With regard to that second question, I will dispose of it at once before I proceed with the facts of the case. We find the law to be thus stated in *Dart* on *Vendors and Purchasers* on page 213 : "He," (that is the agent), "cannot, without special authority, receive the purchase money." One case which is cited by the learned author in support of that proposition is the case of *Mynn* v. *Joliffe*, which is now to be found reported in 42 Revised Reports, page 802. There it was held that "an agent employed to sell an estate has not, as such, authority to receive payment." It was suggested that that decision had only reference to the facts of that particular case where apparently the agent was an auctioneer and it is suggested in one of the Text Books—*Wright* on *Agency*—that that was the effect of the decision. But there is nothing in the decision itself to suggest that its application is to be limited to cases where the agent is an auctioneer. So far as I know, it has never been so suggested in any of the later cases in which this question has been discussed. I also find in the case of *Viney* v. *Chaplin*,[1] the following observation of the Lord Chancellor *Cranworth* on page 437:—"It is quite clear that if a purchaser pays his purchase money to a person not authorized to receive it, he is liable to pay it over again; and it may, I think, be considered as established, that the possession of the executed conveyance, with the signed receipt for the consideration money indorsed, is not, in itself, an authority to the solicitor of the vendor to receive the purchase money." There were authorities cited by the learned vakil who argued this case on behalf of the respondents, and argued with great ability, but it seems to me none of them is in point with regard to this particular question. None of them displaces the authority of the cases to which I have referred. If it became necessary for me to express an opinion on the point, I am prepared to hold that a mere general authority to sell land does not carry with it an implied authority to receive the purchase money for the land on behalf of the principal.

Now let us see how the evidence stands in regard to the first question, *i. e.*, does it establish a general authority in Mr.

1. (1858) 27 L. J. Ch. 434.

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Devarajulu Naidu to sell this house on behalf of the defendants? Mr. Devarajulu Naidu is a Vakil of the High Court. The property in question is owned by two brothers who form an undivided family. Their mother is also alive. On the 20th February 1906 Mr. Devarajulu Naidu wrote the letter Exhibit *A*. That is the first document which has reference to this transaction. In that letter he acknowledged the receipt of Rs. 2,000 in respect of the sale of the house in question, the price settled according to the letter being Rs. 3,500. The balance, the letter goes on, would be paid in the course of a month. Then the letter says: "I will give you the title-deeds of the house on my return from Nellore which will be on or about the 8th March when you can inspect them." There is not a word in that letter to suggest that Mr. Devarajulu Naidu was acting on behalf of clients. Any one reading the letter, it seems to me, would at once form the impression that he was selling this property on his own behalf.

What is the evidence of any antecedent authority given by the defendants to Mr. Devarajulu Naidu to sell this house? The 2nd plaintiff gives evidence. He speaks of a writing, of an advertisement on the wall of the house: "This house for sale, intending purchasers should make enquiries of Devarajulu." Then he goes on "I went inside and saw the house. I then saw defendant 1 and defendant 2 and their mother and asked them. They said the house was for sale, also that Rs. 3,000 or Rs. 3,200 had been offered, and if I wanted the house I should go to Devarajulu Naidu." Later on in cross-examination he says: "When I visited the house all three told me Devarajulu was the person to settle with." Later on again: "Both of them told me to go to Devarajulu and told me to settle everything with him." It is to be observed that this witness, one of the plaintiffs, does not suggest that Devarajulu Naidu ever represented to him that he had authority to sell this house on behalf of the defendants, still less does he suggest that Devarajulu Naidu stated that he had authority to receive the purchase money of the house on behalf of the defendants.

Going back for a moment to Exhibit *A*, one cannot help observing that the method of payment adopted is of an unusual character. The contract apparently was made on the 20th

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Chief Justice.

February. In the ordinary course of business, I take it, the purchase money would have been paid when the conveyance was signed. What happened was that payment was made by the plaintiffs of no less than Rs. 2,000 out of the Rs. 3,500. Further, the payment was not made in cash; it was made by the endorsement of a cheque, which the plaintiff happened to have, to Mr. Devarajulu Naidu. That is a very curious feature of the case and at once, to my mind, gives rise to doubts as to whether this was an ordinary *bona fide* transaction in which Devarajulu Naidu was acting in the interests of his clients or whether it was not a transaction by which he hoped to obtain immediate command of a considerable sum of ready money. Passing on to the 1st plaintiff's evidence, he says:—" I made enquiries of the senior man, the junior man and the mother. They told me to settle everything with Devarajulu." Now I pass on to the evidence of Mr. Devarajulu Naidu himself. Here again, so far as I recollect his evidence, he does not say that he represented to the plaintiffs that he had authority from the defendants to sell this house. At any rate, he does not state that he had authority to sell the house and receive the purchase money. He does not say so in so many words. What he says is: "The house was for sale. A sale was put up. I was to arrange for the sale. The defendants and the mother authorized me to sell the house and invest the money and purchase a small house for Rs. 1,000. They put up the notice that people were to enquire of me." That is what he says in examination-in-chief. In cross-examination he says: "I was to consult them after I got an offer. The plaintiff made the offer a week before I gave the receipt for Rs. 2,000. The price was fixed then. The 2nd defendant was present when I fixed Rs. 2,000. When I communicated it to the mother, I had not communicated with the 1st defendant before giving the receipt. I took the consent of the mother for the receipt of the advance. I did not know what the advance was to be." Then he says: "I wanted money then and I used the money for my own purposes with the consent of the mother and the 2nd defendant." That portion of the evidence has reference to another aspect of the case. Then there is another witness called for the plaintiff, Sundara Chariar. He says, "The house was for sale. There was a notice

on the wall. I offered Rs. 3,200 for a friend Srinivasa Chari. I made the offer to defendants and they referred me to Devarajulu Naidu." There is also the evidence of Rangasawmy Naidu and Manavala Moodelly. That, I think, is all what I may call the antecedent evidence with reference to the alleged authority to Mr. Devarajulu Naidu to sell the house in question. The defendants and their mother deny that any authority was given to Mr. Devarajulu Naidu to sell the house on their behalf.

Then we have to consider whether there is evidence which shows that the defendants ratified what Mr. Devarajulu Naidu did so as to make them liable for his action in entering into the contract and receiving the purchase money. The document Exhibit *C* is relied upon by the plaintiffs as evidence of ratification. This document to my mind raises a strong suspicion as to the *bona-fides* of this transaction. The plaintiffs' case is that they were in treaty with Mr. Devarajulu Naidu as vakil for the defendants for the purchase of the property, and on the 20th February they in good faith paid him Rs. 2,000 as part payment of the purchase money. We find that by Exhibit *C* the signature of the 2nd defendant is obtained to a somewhat extraordinary document which states that the consent of the 2nd defendant and his elder brother the 1st defendant is given for the sale of this house, that the plaintiffs had paid Rs. 2,000 by cheque and a further sum of Rs. 25 on the date of Exhibit *C* to the 2nd defendant, and that the 2nd defendant had received in cash Rs. 2,025. I cannot help asking myself: If this was an ordinary business transaction in which the plaintiffs relied upon Devarajulu Naidu's representations that he was selling on behalf of the defendants, what was the necessity for obtaining this document Exhibit *C* from the younger of the two brothers? Then we find that the document purports to be signed by the 2nd defendant on behalf of his elder brother. The document itself to my mind gives rise to suspicion, especially when we consider the fact that neither in Exhibit *D*, the draft conveyance, nor in Exhibit *E*, the sale-deed, although other payments of sums of money in part payment of the purchase money are recited, is there any reference to this alleged payment of Rs. 25 to the 2nd defendant. It is suggested that Exhibit *C* may have been antedated. I express no opinion about that. But, apart from

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any question of the possibility of its being antedated, it seems to me the document in itself is of a character which cannot but give rise to a considerable amount of suspicion.

Then what is the evidence with regard to the circumstances in which this document was given? The evidence on behalf of the plaintiffs with reference to this document is quite general. I do not think Devarajulu Naidu refers to it at all. The 2nd defendant's evidence is as follows: "I cannot read or write English or Tamil. I received Rs. 25 from plaintiff as a hand loan. Neither my mother nor my brother authorized me to receive Rs. 25. I took it for some business as a hand loan to pay debts. They said you must affix your signature on something like a receipt * * * I do not know in what language it was." Then in cross-examination he said: "I signed *C* as a voucher for Rs. 25." That is the second document upon which the plaintiffs rely as a ratification of the conduct of the alleged agent in entering into this contract to sell.

Then they also rely upon Exhibit *E* which is the conveyance signed by the 2nd defendant. It is an instrument dated the 20th July 1906 and it is signed by the 2nd defendant. It purports to be attested by the mother as a markswoman. Let us see what is the evidence of the 2nd defendant with regard to the circumstances in which he signed this document. The evidence adduced on behalf of the plaintiffs is merely general that the document was signed by the 2nd defendant and attested by the mother. Mr. Devarajulu Naidu says in regard to this: "I was present. 2nd defendant knew what the sale deed was. It was not represented to him that it was a final or stamp paper for Rs. 25. It was read over to him." That is what he says with reference to Exhibit *E*. In cross-examination, speaking of the 2nd defendant, he says: "Defendant 2 does not write English. He can read Telugu. I have not seen him read or write Tamil." In examination-in-chief the 2nd defendant says: "I signed *E*. It was not read out and explained to me. Devarajulu Naidu was present. I asked him what it was. He kept quiet. Alwar Chetty kept quiet" (I will refer to him later). Then there is a passage which is not quite clear—"But the plaintiffs said you borrowed 25 being 5 on the first occasion and 20 on the second. This

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is an " on demand " for that. My mother was downstairs. She was not present when I signed." In cross-examination he says: "I signed *E* in plaintiffs' house. My mother was downstairs. I first went to the plaintiffs' house and then went back and fetched my mother. The plaintiffs said I had to give my signature for the 5 and the 20 and that my mother should also be brought for that purpose. Although I took my mother she was not present when I signed. * * * I wrote the statement that 'this is the mark of S. Ranganaikammal.' I did not see my mother there when I signed it. They wanted her to affix her mark. She refused and went downstairs." "My mother enquired what the document was about and they said it was about the Rs. 25. It was in reply to her they said that. It was in reply to me and not to my mother." Then the mother with reference to this Exhibit *E* says: "My son came and called me and I went to plaintiffs' house with my son. The plaintiffs said there was a paper for 5 and a paper for 20, and that as they were on two papers, now as only one paper is required, you need not be afraid. They asked me to put my signature. I refused." That I think is the evidence with regard to the circumstances in which, according to the case for the plaintiffs, this document, Exhibit *E*, was signed by the 2nd defendant. Again I have to point out that it seems unusual if it was a transaction on behalf of the family that the plaintiffs would be content with the signature of the 2nd defendant. The 2nd defendant was at that time a youth of 18 or 19 years and Mr. Justice Wallis observes in his Judgment that neither he nor his brother, the 1st defendant, appear to be 'of a high order of intelligence.'

With regard to the oral evidence as to the alleged ratification by the principals, the two defendants, of what was done by their agent, Mr. Devarajulu Naidu, the case put forward by Mr. Devarajulu Naidu is that he retained the whole of this purchase money and that he used it for his own purposes and that he did this under the authority of the defendants and their mother. The evidence of the 2nd plaintiff, if true, would show that the defendants authorized the retention of this money by Mr. Devarajulu Naidu. That authority to retain of course would be a ratification of the receipt by him of the money on their behalf. The 2nd plaintiff says: "I paid by cheque on the

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National Bank for Rs. 2,000-0-0, in my favour which I endorsed in blank. I offered it to 2nd defendant but he told me to give it to his brother-in-law." The witness is apparently speaking to what took place on February 20th. In chief examination, Mr. Devarajulu Naidu says: "On the 20th I received Rs. 2,000-0-0. The 2nd defendant and his mother knew subsequently." I do not say these two statements are mutually contradictory: but the statement that the 2nd defendant and the mother knew subsequently, *i. e.*, subsequently to the 20th February, is certainly inconsistent with the statement by the 2nd plaintiff that he offered the cheque to the 2nd defendant on the 20th February and that the defendant then told him to give it to his brother-in-law, *i. e.*, Mr. Devarajulu Naidu. What does Mr. Devarajulu Naidu say with reference to the suggested ratification? I have read a portion of his evidence. He said: "The 2nd defendant was present when I fixed Rs. 2,000-0-0 * * * . I wanted money then and I used the money," *i. e.*, the money which he received from the plaintiffs, "for my own purpose with the consent of the mother and the 2nd defendant. The 1st defendant was saying that the money was to remain with me. It had been settled that the sale proceeds was to be invested with me." That certainly is a very curious story—it is a general statement that he had a general authority to retain the money which he was to receive on the sale of this property and to use it for his own purposes. Mr. Devarajulu Naidu was in a somewhat delicate position and it behoved him, it seems to me, to be particularly careful to see that the sale proceeds of this property reached the hands of his clients—two young men not particularly 'bright' who were his connections or relations. After the money had safely reached their hands, it was open to him of course to come to a fair arrangement with them for the purpose of getting the money back for his own purposes. It seems to me if he was not prepared to pay the money over to his clients—I take it they were his clients—then he could have obtained precise and specific written authority from his clients before he proceeded to appropriate the money to his own purposes: and if he chose to act in the way he did act, all I can say is that it is necessary carefully to scrutinize the statements which he makes in the witness-box seeing that he was not only an interested witness in the sense that he wanted to support the sale but also an interested witness

in the sense that he got and used the money. In these circumstances, I say it is necessary to scrutinize his evidence with the greatest care. Now the two defendants and the mother deny that he had any authority to sell the house at all. The question is: Which story is one to accept?

There is another somewhat curious feature in connection with this case. One would have thought that Mr. Devarajulu Naidu, a Vakil, would have taken the earliest opportunity in his examination-in-chief to explain that, although he was acting for these parties in connection with the sale of this house, it had been arranged that he was to use the money for his own purposes. There is not a word of this in examination-in-chief, and it is not until we come to his cross-examination he says: "I wanted money. I used it for my own purposes with the consent of the mother and the 2nd defendant." Of course it is an unusual story but it is a possible story, and if there had been something in the nature of evidence to corroborate it, one might be prepared to accept it, notwithstanding the denial given by the defendants and their mother. Mr. Devarajulu Naidu apparently saw the desirability of this story receiving some corroboration because he says in his cross-examination: "It was at that time I gave a promissory note in favour of the mother for Rs. 2,500 of my own accord." That Rs. 2,500 is the amount of the purchase money. "I gave it to Alwar Chetty at her request." Now the mother denies that she ever asked Devarajulu Naidu to give to Alwar Chetty. The person to speak of this transaction is of course Mr. Alwar Chetty himself. Mr. Alwar Chetty was not called as a witness by the plaintiffs. The learned Judge in coming to the conclusion at which he arrived attached a good deal of importance to the fact that there was no immediate repudiation of the allegations in Exhibit *F* which is a letter sent on the 2nd July 1906 by Mr. Doraisamy Iyengar, who was acting for the plaintiffs, to the defendants. In that letter the part payments of the purchase money are stated and a tender is made of the balance of the purchase money Rs. 975. It is admitted that the 1st defendant refused to accept the Rs. 975 which was then tendered as the balance of the purchase money. And, although no doubt weight is to be attached to the fact that there was not an immediate repudiation, seeing that the tender was refused by the

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1st defendant, speaking for myself I do not know that I am prepared to attach as much importance to that fact as the learned Judge apparently thought should be attached to it.

I always hesitate to differ on a question of fact, where the Court of first instance had the great advantage of hearing the witnesses and seeing their demeanour in the box, and so it is not without some hesitation that I differ from the conclusion of fact at which Mr. Justice Wallis arrived. But after giving the best consideration I can to the evidence and having had the benefit of a full argument on behalf of the respondents, the conclusion at which I have arrived in this case is that the plaintiffs have not discharged the *onus* which rests upon them and that they have not shown that the 2nd defendant gave to Mr. Devarajulu Naidu a general authority to sell this house at the price at which he purported to sell it without any further reference to the defendants or to their mother; and that being the finding of fact which I feel myself on the evidence compelled to arrive at, I think we must set aside the decree of the learned Judge in favour of the plaintiffs and dismiss the suit with costs here and in the Court of first instance. And one word with regard to Mr. Devarajulu Naidu. My learned brother and myself have consulted together in the matter and it seems to us that there is a *prima facie* case for enquiry into Mr. Devarajulu Naidu's professional conduct* in connection with this transaction and the necessary steps will be taken with a view to holding an enquiry.

Abdur Rahim J :—This appeal is from a judgment of *Wallis* J. in a suit instituted by the plaintiffs to enforce specific performance of a contract to sell a house belonging to the defendants Nos. 1 and 2. The contract to sell the house was entered into by Mr. Devarajulu Naidu, a Vakil of this Court, and the first question is whether Mr. Devarajulu Naidu had authority in that behalf from the defendants. All that is proved in this connection is there was a notice put up on the outer wall of the house that the house was for sale and that enquiries were to be made of Mr. Devarajulu Naidu who was then acting as vakil of the defendants. Then we have the evidence of the two plaintiffs that on enquiry being made of the defendants they were referred by them to Mr. Devarajulu Naidu who would settle everything. There is also the

* See page 494.

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evidence of another intending purchaser who was similarly referred to Mr. Devarajulu Naidu. This is all the evidence of authority relied upon on behalf of the respondents. They do not appear to have made any proper enquiries as to the nature and extent of Mr. Devarajulu Naidu's authority. It seems to me it will be going too far to say that the notice on the outer wall of the house and what was said by the defendants shows that Mr. Devarajulu Naidu had authority to sell on their behalf. All that it amounts to is that the defendants referred to their vakil who was authorized by them to treat with the purchasers and to negotiate with them regarding the sale of the house; and this is made still clearer by the fact which Mr. Devarajulu himself admits in his cross-examination that he was to consult the defendants as regards the price of the house. But it has been contended by the learned vakil for the respondents that, if there was no authority to begin with, there has been ratification of the act of Mr. Devarajulu by the conduct of the defendants; and for this purpose he relies upon Exhibits *C* and *E*. Exhibit *C*, as pointed out by his Lordship the Chief Justice, is a most curious document, and I agree with him in regarding it as a most suspicious feature in the case of the plaintiffs. Immediately after the contract was entered into Rs. 2,000 was paid to Mr. Devarajulu as an 'advance', but it appears that some time afterwards, the plaintiffs paid Rs. 25 to the 2nd defendant who at the time was about 18 years of age, and got him to sign Exhibit *C*. It is absolutely clear that the design of Exhibit *C* was to get an acknowledgment of the authority of Mr. Devarajulu from the 2nd defendant and there can be little doubt that the plaintiffs felt the need of such a document as they were not sure at the time that Mr. Devarajulu Naidu had authority to sell the house. The 2nd defendant says that he received the Rs. 25/- as a loan and he understood that the document which he signed only related to the loan. Exhibit *C* is written in Tamil. It is not proved that the 2nd defendant knows Tamil, and if he did read and write Tamil, Mr. Devarajulu Naidu, who was a witness for the plaintiffs, was in a position to prove it. The 2nd defendant has had no independent advice and, having regard to the circumstances under which Exhibit *C* was executed, I am altogether unable to rely upon it as evidence of ratification. I should also like to point out that the existence of this document, Exhibit *C*, is not mentioned

either in Exhibit *D* or Exhibit *E*. Exhibit *D* is a draft conveyance and Exhibit *E* is the sale-deed purporting to have been signed by the 2nd defendant. Both these documents recite the sums of money which had been paid; but most curiously make no mention of the Rs. 25. I find it, I must admit, difficult to conceive that a purchaser of property who had paid even a small sum like Rs. 25 under circumstances which would make the receipt obtained for Rs. 25 of the greatest importance to him, should have forgot the fact of the payment or the existence of the document. A suggestion was made by the learned vakil for the appellants that Exhibit *C* must have been antedated. In the absence of any explanation as to why it is not mentioned in Exhibits *D* and *E*, I am not prepared to say that the suggestion is without foundation.

Exhibit *E* is signed by the 2nd defendant. It is a document in English and the 2nd defendant does not know English; he can only sign his name in that language. The evidence as regards its execution is that the document was read out to the 2nd defendant and he signed it. But I do not see the use of reading out a document written in a language which is not known to a person without explaining what it is all about. The plaintiffs or their legal advisers could not have failed to realize the importance of the execution by the 2nd defendant of this document; and if the 2nd defendant executed it with knowledge of its contents, proof of this ought to have been forthcoming.

It has been contended by the learned vakil for the respondents that the 2nd defendant having signed the document, the burden is thrown upon him to show that he signed it without knowing its contents. Undoubtedly that is so. In ordinary circumstances, one would expect that the person who alleges that he signed a document without knowing the nature of its contents, must satisfy the court to that effect. But, having regard to the circumstances of this case, it is impossible for us to regard the signature of the 2nd defendant to Exhibit *E* as having been put with the knowledge of the contents of that document.

Now I come to the evidence of Mr. Devarajulu Naidu himself. The learned Judge in the Court of first instance has accepted his evidence and relied upon it. We are bound, on a pure question of believing or not believing the evidence of a

particular witness, to attach the greatest possible importance to the opinion of the learned Judge who saw the witness while giving his evidence regarding the credibility of his evidence; but there are facts in this case bearing upon the conduct of the witness which, if unexplained, are of greater materiality as affecting the weight to be attached to his words than his mere demeanour in the witness box. It appears that, at the time of the transaction, this witness was in considerable pecuniary difficulties. There were decrees against him and he was pressed for money. It is possible there was some talk at that time among the defendants and their mother of particicning their property. If there was such a proposal, Mr. Devarajulu seems to have seized the opportunity of suggesting the sale of the house with the result that the entire sale proceeds went to his pocket. He was their professional adviser and a distant connection. He does not tell them, and there is no evidence in the case from which we might infer, that these two young men knew anything about his embarrassed circumstances. In the witness box he gives out that he owns certain mica mines worth 1 lakh of rupees; but all the same he was in great monetary difficulties. Without apprising his clients of his real pecuniary position, he advises them to sell the house, and when he manages to sell the house he appropriates the money to his own use. He says he gave a pro-note in favour of the mother of the defendants for Rs. 2,500 which he says he borrowed from them with their authority. But that pro-note is not produced and no attempt has been made to produce it. Alwar Chetty, to whom the pronote is said to have been handed over, was not examined. These are the facts which should be borne in mind in examining Mr. Devarajulu Naidu's evidence; and I must confess that these circumstances weigh with me considerably in not accepting his evidence unless corroborated by other evidence.

As regards the authority to sell the house, knowing, as I think he did, that he intended to appropriate the proceeds of it, I should have expected that, having regard to his professional relation to the defendants, he would have taken every precaution to secure a proper authority from them. He does nothing of the kind.

Then as regards his statement that he had authority further "to invest the money with himself", I should have thought that

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having regard to the facts already mentioned, he would have been still more careful not to leave the fact of his having such authority a matter for debate. He was a most interested witness in the case, perhaps in some respects even more interested to support the transaction than the plaintiffs; and there being no corroboration of his evidence as I read the record, I regret, I cannot agree with the learned Judge that the word of Mr. Devarajulu Naidu should be accepted on the question of authority.

As regards the question of law that has been discussed, whether authority to sell, supposing there was such authority in this case, would include an authority to receive the purchase money, it seems to me there can be hardly any room for doubt that, when the authority to sell is with respect to immoveable property, it does not ordinarily imply an authority to receive the purchase money. The learned vakil for the respondents has relied on the cases of *Capel* v. *Thornton* and *Howard* v. *Chapman* reported in 33 Revised Reports, page 678 and 34 Revised Reports, page 814, respectively, in support of his contention to the contrary; but those were all cases of sale of goods. It seems to be quite evident that if an agent, for instance, an assistant in a shop, has authority to sell goods, it is to be presumed that he should have authority to receive the price of those goods. But the case of a sale of immoveable property is not governed by similar considerations and, as has been pointed out by the learned Chief Justice, the authorities show that a person having authority to sell immoveable property does not, by necessary implication, have the authority to receive the purchase money. I agree in the order proposed by the learned Chief Justice.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Miller and Mr. Justice Krishnaswami Aiyer.

*In the Matter of a Vakil of the High Court.**

Mr. *M. D.* a Vakil of the High Court.

Pleader—Professional misconduct—Agency business—Using principal's money for agent's own business without authority.

A vakil acting as an agent for sale of immoveable property will be acting improperly in using the purchase-money for his own purposes without authority from his principals

* 12th April 1910.

In the particular case before their Lordships, they deemed it sufficient to censure the vakil for the abuse of his position as agent, having regard to the fact that the vakil was not acting as vakil in the agency and also to the fact that there was no dishonest intention on his part.

In re a High Cour Vakil.

Rule dated 24th March 1910 issued to Mr. *M. D.* a Vakil of the High Court, calling upon him to show cause why he should not be suspended or dismissed under S. 10 of the Letters Patent for selling a house belonging to the defendants in O. S. No. 192 of 1906* without their consent and appropriating to his own use without their authority a sum of Rs. 2,500 received by him on their behalf as part of the purchase price of the said house.

A Vakil was asked to negotiate a sale of a house belonging to two brothers, one of whom was a minor represented by his mother as guardian. The Vakil concluded a contract for sale with certain persons from whom he received an advance of Rs. 2,000 in February 1906 and Rs. 100 and Rs. 400 in May 1906. In July the sale was repudiated by the vendors and the Vakil thereupon executed a promissory note for Rs. 2,500 in favour of one Alwar Chetty a relation of the vendors. The vendees then brought a suit for specific performance of the contract to sell against the vendors in which it was held that the Vakil had no authority to conclude a contract or to receive Rs. 2,500 on behalf of the vendees. In the meanwhile Alwar Chetti obtained a decree on the pronote for Rs. 2,500 against the Vakil which remained unexecuted owing to his doubt whether he could execute the decree. The charges against the Vakil are that he sold the house without the owners' authority and that he misappropriated the Rs. 2,500 to his own use between February and July 1906 by utilising it in his mica mines which had been a source of loss to him especially at a time when he was in great pecuniary difficulties unable to discharge many of his debts.

The Advocate-General (*P. S. Sivaswami Aiyar*) for the Pleadership Board.

P. R. Sundara Aiyar for the Vakils' Association.

J. L. Rosario for the Vakil.

The Advocate-General.—The charges relate to (1) the pleader's right to receive the purchase money and (2) his right to retain the money. As for the first, there may not be any moral delinquency in receiving the money inasmuch as he might have *bona*

* See page 479.

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fide thought that his authority to sell would give him power to receive the money—[*Aiyar* J.—Yes; many people think so.] [*C. J.*—You need not refer to the authorities to show whether an authority to sell gives one a power to receive the money.] The Advocate-General then went into the evidence showing whether the Vakil had authority to sell the house. There is no voucher or security given by the Vakil to the vendors at the time of his receipt of Rs. 2,500. It was some time afterwards, *i.e.*, after the sale went off, that he says that he executed a pro-note for this sum in favour of a stranger. There was a misappropriation to one's own use even though it be for a short time. It is an offence under S. 405, I. P. C. Dishonesty lay in utilising the money without the consent of the vendors, especially at a time when the Vakil was in embarrassed circumstances. [*C. J.*—The vendors were the relatives of the Vakil.] [*Aiyar J.*—Can you say that he acted as a Vakil in this case or as a friend or relative?] Yes: he is a relative and it is impossible to say that he acted as a Vakil. [*Aiyar* J.—Is it one of the usual kind of things for a Vakil to act as a broker to sell a house?] No. Any how even as a relative he ought to have been more honest. [*Aiyar* J.—What is the degree of criminality you attribute to him?] Temporary misappropriation without any authority from the vendors. [*Aiyar* J.—Could he not have *bona-fide* believed that he had authority to use the money temporarily, especially as he was asked to make the partition between the two brothers, the vendors?] If he had paid the interest for the period, that would have probably shown the absence of *mala-fides*.

P. R. Sundara Aiyar, for the Vakils' Association.—A Vakil who is asked to sell land and who receives the purchase money ought to treat that money distinct from other money and from outfees as it stands in a different position. Outfees are considered as debts. Misappropriation of such purchase money even temporarily, whether the Vakil acted as Vakil or not, is not justified. [*Aiyar* J.—Vakils do not seem to give stamped receipts for outfees as in the case of debts.]

J. L. Rosario.—[The Court intimated to Mr. Rosario that he might confine his arguments to the question as to his client's right to retain the money and utilise it for his

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purposes.] The Vakil had the consent of the vendors to receive and retain the money. [*Court.*—No consent to retain can be assumed. You retained it from February to July.] I gave a promissory note in July which was accepted by the vendors. [*Court.*—What is there to show that the parties gave up their right to interest? Unless you prove the consent of the vendors for your retention and dealing with it as you liked, how is your appropriation justified? You spent it in your speculative concern.] [*Aiyar* J. The 1st vendor was a major; the 2nd was a minor whose mother you say gave you consent. Do you say that you had the consent of the 1st who was not present for your utilising the money.] It is now assumed that I had authority from all to receive the money. The other side must establish that I am guilty. My guilt cannot be assumed. Nor any dishonest intention. It is only a civil liability for which a security was given. My client's conduct may be highly injudicious. What has taken place does not deserve any condemnation in the shape of dealing with under the Legal Practitioners' Act.

The Court delivered the following

JUDGMENT:—For the purposes of the question with which we have to deal to day we assume that the Vakil had authority from the 1st and 2nd defendants in the suit to receive the purchase money of the house on their behalf.

The Vakil, who was called by the plaintiffs as a witness at the hearing of the suit, admitted that he had used the money for his own purposes. It is clear that the only justification for his doing this would be an express authority from the parties on whose behalf he had received the money. He stated in his evidence that he had used the money for his own purposes with the consent of the 2nd defendant and the mother of the defendants Nos. 1 and 2. As regards the 1st defendant, the Vakil stated that the 1st defendant said the money was to remain with him and that it had been settled that the sale proceeds were to be invested with him.

The 1st defendant denied that he authorized the Vakil to retain any portion of the purchase money.

The Vakil having, as we assume, received the money on behalf of the 1st and 2nd defendants, in our opinion the onus lay,

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and lay heavily, on him to prove an authority from them to use the money for his own purposes. We are of opinion he has failed to discharge this onus. His story on the face of it is a highly improbable one. We find it difficult to believe that he would not have taken from the defendants some written authority empowering him to use their money for his own purposes, if such authority had in fact been given.

Mr. Rosario asked that he might be given the opportunity of examining one Alwar Chetty to whom a promissory note for the amount of the purchase money had been given by the Vakil. In view of the fact that the promissory note is dated 5 months after the receipt of the money and after the sale had fallen through, we do not think we should desire assistance for the purpose of the question we have to deal with to day from the evidence of Mr. Alwar Chetty.

Mr. Rosario admitted that his client did not attempt to obtain an express consent from the 1st defendant for the using of the money for his own purposes, and we are not satisfied he obtained the consent of the 2nd defendant.

We are prepared to believe that the Vakil had no intention to act dishonestly. In using the money he abused his position as an agent, but in so doing he does not appear to have been acting in his capacity as a Vakil. We think we are taking a lenient view in refraining from making an order of suspension, but we have come to the conclusion that the requirements of the case will be met by censuring Mr. *M. D.* a Vakil of this Court, for his conduct in using the money of others, whom we have assumed for the purposes of to-day to be his principals, for his own use without their authority.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Miller and Mr. Justice Krishnaswami Aiyar.

Taken up Case.

Re-T. 2nd accused in Calendar Case No. 112 of 1908 on the file of the Sub-Divisional Magistrate, Tirukoilur, and 2nd Grade Pleader, South Arcot.*

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* 4th April 1910.

Pleader—Professional misconduct—False plea of alibi in a case against the pleader.

In re a Second Grade Pleader.

In the case of alleged professional misconduct on the part of a pleader who was the accused in a case of defamation in that he set up a, false plea of *alibi* their Lordships thought they were not called upon to make any order.

A Second Grade Pleader who was charged with defamation set up a plea of *alibi* but was convicted, the Court finding against the plea of *alibi*. The question before the Court in the enquiry under the Legal Practitioners' Act was whether the pleader was guilty of misconduct in setting up a false plea of *alibi*.

J. L. Rosario for the Pleadership Board.

T. Rangachariar for the pleader.

T. V. Seshagiri Aiyar for the Vakils' Association.

J. L. Rosario.—The pleader is guilty of misconduct in that he knowingly set up a false plea of *alibi*. Defaming another is not conduct worthy of approbation. A conviction for such offence lowers the person in the eyes of others. Conduct such as this is "misconduct" within the meaning of Ss. 12 and 13 of the Legal Practitioners' Act. Misconduct need not be professional. Any kind of misconduct implying a defect of character which unfits a man to be a pleader will do. Cl. (*f*) of S. 13 speaks of 'any other reasonable cause.'

T. Rangachariar.—I am asked to show cause why I should not be dealt with under the Legal Practitioners' Act alleging as a reason therefor that I set up a false plea of *alibi*. Three things have to be established before I could be dealt with under the Act. First, that I was not entitled to defend myself by setting up any plea just like any other accused; second, that the plea of *alibi* is false, and third, that my conduct in setting up a false plea is such professional misconduct as to entail my being dealt with under the Act. [*Aiyar* J.—Can we go behind the conviction?]. Yes. It is not *res judicata*. The courts and proceedings are different—*Vedanayaga Mudaliar* v. *Vedammal.*[1] The Court can go behind the conviction. I am entitled to show now that the *alibi* set up by me is not false. S. 12 deals with convictions generally. Ss. 13 and 14 deal with professional misconduct. The word 'other' in clause (*f*) of S. 13 must be construed *ejusdem*

1. (1904) I. L. R. 27, M. 591.

In re a Second Grade Pleader.

generis with the other kinds of misconduct mentioned in that section. [The evidence relating to the truth of the *alibi* was then read]. Even if the plea of *alibi* be false, that, under the circumstances of this case, does not imply a defect of character which unfits my client to be a pleader. Conviction for defamation and the setting up of a false plea by an accused therein do not show moral delinquency. *Vide In re Quarry*[1]; *In re Sarvadhikary*[2]; *In the Matter of Purna Chandra Pal*[3]; *In the matter of Askan Ali*[4]; *In the Matter of a First Grade Pleader*[5]; *In re a Pleader*[6]; *Le Mesurier* v. *Wajid Hossein*[7]; *In the Matter of a Pleader*[8]. *In re Ganapathi Sastri.*[9] *In re Wallace*[10] shows that if a practitioner is a party, anything done by him, however improper it may be, cannot be deemed to have been done by him as a practitioner for which he could be punished under the Act.

The Court made the following

ORDER :—We are of opinion that in this case we are not called upon to make any order under the Legal Practitioners' Act.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Miller and Mr. Justice Krishnasami Aiyar.

In the matter of 2 *Second Grade Pleaders.**

In re Two Second Grade Pleader.

Legal Practitioners Act, S. 13 (f)—"Other reasonable cause," meaning and scope of—Ejusdem generis—Association with fraudulent companies.

S. 13 *(f)* of the Legal Practitioners Act is not confined to professional misconduct only, but includes any dishonest or dishonorable conduct whether or not in the discharge of professional duty.

The association of Pleaders as President or Directors in so-called Provident Companies, which have no substantial basis to work upon but are a fraud on the public, is a reasonable cause within the meaning of S. 13, Cl. *(f)*.

In this case two Second Grade pleaders were asked to show cause why they should not be dealt with under the Legal Practitioners Act inasmuch as they were Directors of a ' Fund ' or Insurance Company knowing it to be a fraudulent concern. For further facts see 20 M. L. J. R. 220.

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* 19th April 1910.

1. (1890) I. L. R. 13 A. 93 (P.C.)
2. (1906) I.L.R. 29 A. 95, 108.(P.C.)
3. (1899) I.L.R. 27 C. 1023.
4. (1908) 5 A. L. J. 126.
5. (1900) I.L.R. 24 M. 17,
6. (1907) 18 M.L.J. 184.
7. (1902) I.L.R. 29 C. 890 (F.B.)
8. (1902) I.L.R. 26 M. 448.
9. (1909) 19 M.L.J. 504.
10. (1866) 1 P.C. 283.

In re two Second Grade Pleaders.

J. L. Rosario for the Pleadership Board.
T. Rangachariar for the 1st pleader.
T. R. Ramachandra Aiyar for the 2nd Pleader.

J. L. Rosario.—The Prospectus, the Articles and the Memorandum of Association all prove that this company cannot live for more than 2 or 3 years and that the principles upon which this is sought to be worked show to any man of average sense that it is a fraudulent concern. S. 37 of the Indian Companies Act specifies what a company should state in its Prospectus and Memorandum before it is registered. The judgment of the Sessions Judge who discharged the accused and that of the High Court show the fraudulent nature of the Company. It is clear from the evidence that the accused knowingly concerned themselves in the conduct of the company.

[*T. Rangachariar* at this stage said that the charge is not definite and that an argument on the general conduct of the company in the hope of evolving some fraudulent design out of it on the part of the pleaders is undesirable in the interests of the pleaders in as much as they do not know what definite charges they have to meet.]

[Their Lordships intimated that the notice to the pleaders and the drift of the argument show that a charge of fraud in floating and conducting the company is aimed at. If there is anything indefinite now some definite charge will be made at the end of the argument.]

J. L. Rosario then dealt with the various documents for originating the company, effecting its registration for promoting it, and for influencing the public to become subscribers therein—all were with a view to deceive the public. S. 13, Cl. (*f*) includes any kind of moral delinquency. *In re-Wallace*[1] itself shows this.

T. Rangachariar.—The only persons who complained against me that they were cheated were the prosecutors in the previous case which ended in an acquittal. No other cases of cheating were forthcoming, nor are they forthcoming. There is no case of anybody being cheated by the prospectus. [*Court.*—Why is not your client guilty of being engaged in a trade as 'Director' without the permission of the High Court?

1. (1866) L. R. I. P. C. 283.

In re two Second Grade Pleaders.

The rule infringed is Rule 28.] The rule is *ultra vires*. There is no section or portion of S. 13 under which the rule purports to have been made. The 6th accused is the person who schemed the whole concern and the 1st accused was only passively concerned. [*Court*:—You lent your name to the conduct of the company.] That may create a civil liability, but the question is whether I was a party to a swindling concern knowing it to be such. [*Court*.—Recklessly lending your name to a concern which you ought to have known or would have known, if you bestowed some attention, to be a swindling concern may be by itself sufficient to bring you under Cl. (*f*) of S. 13.] The prospectus refers people to the rules which are explicit and which show what amount each subscriber can get for every rupee of his and from what source that amount would come. People joined the association with their eyes wide open. [*Court*.—The Memorandum of Association mentions 400 people as members. You held out that 400 people will guarantee the payments. There were not 400 originally. How did you change the 400 into larger members?] The mention of 400 was due to a mistake. It has been now found that only 7 people were to be the company and not the 400. We once thought that the pattadars were members for the purpose of registration. This company is just like any Insurance company. [*Aiyar* J.—The principles of an Insurance company are quite different. How will you pay double the amount?] The so-called promise to pay at least double the amount is only the expression of a hope. The Articles of Association when rightly construed amount to that. The articles actually say that there will be occasions when the profits may sometimes fall short of double the amount.

The Court passed the following

ORDER.—The *Chief Justice*.—In these proceedings two Second Grade Pleaders have been called upon to show cause why they should not be suspended or dismissed by reason of their conduct in having joined the Board of Directors of the "Circars Provident Fund Ld., of Bapatla" and in connection with the affairs of that Company. The Company is now in liquidation. One of the pleaders was the President of the company. I will refer to him as 'the President'. The other was a Director. I will refer to him as 'the Director,'

Criminal proceedings were taken against the two pleaders in connection with the affairs of the company and they were convicted of criminal breach of trust by the Sessions Judge of Guntur. On appeal these convictions were set aside. There can, I think, be no question that the convictions could not be upheld. In appropriating to their own use the sums of money which formed the subject-matter of the charge of criminal breach of trust, the President and the Director did not exceed the rights which they had conferred upon themselves by the Articles of Association. In law the Company would seem to have consisted only of 7 signatories to the Memorandum of Association.

The *modus operandi* of the Company is described in the Judgment of *Abdur Rahim* J. setting aside the convictions. The fund of the Company was to consist of subscriptions paid by persons who are called 'pattadars' and also described as "subscribers" or "nominees" or "diploma-holders." The subscriptions payable were to be at the rate of Re. 1 a month and no subscription was to be paid after 53 payments or after the death of the person called "Darkastdar" or "Applicant." At the end of each year, half the amount of the money collected during the year was to be distributed among the "Nominees" of those "Applicants" who happened to die during that year in proportion to the amount of money paid under each pattah subject to the maximum of Rs. 1,000. By Rule 14 of the Articles of Association 8 Annas out of every Rupee subscribed was to go towards the bonus fund, while the remaining 8 Annas was to be dealt with as follows:—

RS.	A.	P.	
0	2	0	Reserve Fund.
0	0	6	Guarantee Fund up to Rs. 5,000.
0	0	6	Charity Fund.
0	2	0	Commission to Agents.

The rest, *i.e.*, 3 Annas out of each Rupee "will go towards the expenses of the company," *viz.*, office establishment, charges, printing charges, etc., and towards the profits of the company, or *company people*, the vernacular words being "company varu." Another rule (No. 10) provided that the first Rs. 3 paid by a subscriber would be treated as entrance fee and not as subscription and 'this entrance fee will be appropriated by the company

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Chief Justice.

people for expenses etc; and shall not form part of the bonus which will be distributed." The object of the guarantee fund was to secure to the nominees at least twice the amount paid by the subscribers. This is the benefit which is promised in express words to the nominees or subscribers in the bonus which in no case is to fall short of twice the amount paid as "subscriptions", but which may extend up to Rs. 1,000.

The 'applicant' or 'darkhastdar' on whose death alone his pattadar or nominee is to get the bonus that may fall to his lot, need not be under any particular age-limit, nor is any certificate required as to the state of his health nor need he be in any way related to the nominee so as to give the latter an insurable interest in his life. A lucky pattadar therefore stands to win a prize of Rs. 1,000 for paying in a few rupees, may be 12 or may be 53, but not exceeding Rs. 53, and in any case a pattadar whose darkhastdar happens to die before the Company is wound up, is sure to get twice the amount subscribed. There is no proper provision for the profitable investment of the funds of the Company and the Company may go into liquidation whenever it chooses. Such a concern can only last so long as there is an accession of new diploma-holders every year and a fair proportion of the 'applicants' do not happen to die in the course of the year." The learned Judge observes: "As a business undertaking it has no sound or stable financial basis and the so-called Provident Fund appears to be more in the nature of a lottery than anything else." *Benson* J. said:—"There can be no doubt, I think, that the so-called Provident Fund with its hypocritical professions of philanthrophy and large promises of profit to all, was, from its very inception, a gambling concern cunningly devised to swindle the unwary and ignorant."

In law, as I have said, the Company consisted of the President and the 6 Directors, the 7 signatories to the Memorandum of Association. These parties by the Articles of Association made due provision for lining their own pockets so long as the Company continued to do business It seems clear from the description of the *modus operandi* of the Company to which I have referred and from the facts that the subscriptions were limited to 53 months, that the so-called reserve and guarantee funds were

wholly insufficient and that the Company's guarantee by which the liability of the Company was limited was altogether illusory, that sooner or later the Company was bound to find itself in a position in which it could not fulfil its obligations. The prospectus states that "the gain resulting from increase in the number of subscribers is to the starters and not to the subscribers, but it seems to me that the only thing which could have kept the Company alive for any substantial period, would have been a large increase in the number of subscribers each year. So far as the subscribers were concerned the undertaking was a pure gamble and the prospects of a success in the gamble were in direct ratio to the badness of the life insured. If any intelligent person invested his money in the concern he can only have done so in the hope that the life which he had got insured in his favour was sufficiently bad to warrant the expectation that the Company would outlast the life. Lives were 'insured,' if one can use such an expression, without regard to the age or health of the insured person and without any suggestion of an insurable interest in the party in whose favour the insurance was effected. The Prospectus of the Company as a business statement is ridiculous. The Memorandum of Association contains statements which are misleading if not false. In paragraph 2 it is stated that the number of the subscribers of the Company shall for the present be 400. Presumably this statement is made for the purpose of S. 37 of the Indian Companies Act, 1882, which requires that the number of members with which the Company proposes to be registered should be stated. But the subscribers here mentioned are not members of the Company. They are the parties who are to have the benefit of the death of the insured persons or "applicants."

The reference to the number of subscribers being 400 would seem to have been made either with the intention to mislead, or under a misapprehension of the requirements of the law.

Paragraph 3 of the Memorandum of Association is false. The object of the Company is not as stated to afford to the subscribers an opportunity of making some provision for their families or friends at their death, but to enable the 'subscriber' to benefit by the death of an 'applicant.' A reference to definitions 2 and 3 in the Articles of Association makes this clear.

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The excuse put forward by the President was that he had no knowledge of the working of the fund and that he only consented to act on the undertaking that the business should be managed by the 6th accused in the criminal proceedings. This cannot be accepted as an excuse. The value of the President as a figure head in, assuming he was merely a figure-head, lay in the fact that he was a pleader and it was no doubt expected that this fact would help towards inspiring confidence in the public. If I took the view that the President had associated himself with this Company with the intention of swindling the public there would, in my opinion, be no alternative but to suspend him from practice altogether notwithstanding the fact that the criminal proceedings against him had proved abortive. At any rate for the purpose of the question now before us, I prefer to deal with this case on the footing that the President and the Director did not intend to cheat the public but that they knew or must be taken to have known that this so-called Provident Society was in no sense a Provident Society and in no sense an undertaking for the purposes of life insurance in the ordinary acceptation of the term, but that it was a means of furnishing profit to the Directors by enabling those who so desired to gamble on the lives of parties who were willing to become 'applicants' to the society. The action of the President and the Director in associating themselves with such a Company as Directors to my mind is '*reasonable cause*' for an order being made under S. 13 of the Legal Practitioners Act. As regards the question of law which has been argued before us, as to the construction of S. 13 (*f*) I adhere to the view which I took in *In the matter of a First Grade Pleader*[1]. In my opinion in the case of the President an order of suspension should be made. I think we may take into consideration the fact that he has undergone a substantial term of imprisonment under the conviction which was set aside on appeal to this Court. I think we may also take into consideration the fact that in this Presidency at any rate so-called Provident Societies of the class we have had before us are by no means uncommon and that up to now, this Court had not had occasion to mark its sense of the conduct of Legal Practitioners who, whilst keeping within the letter of the law as it now stands, avail themselves of the law to work what are really gambling undertakings under the

1. (1900) I.L.R. 24 M. 17.

guise of limited Companies which purport to be promoted for provident or life assurance purposes.

I would suspend the President for 3 months from this date.

As regards the Director his excuse is, he merely lent his name. He received about Rs. 175 as profits in the first year, but he resigned in the second year without claiming any profits. He has been put to heavy expense in the criminal proceedings. I think his conduct in joining the Company without sufficient enquiry was foolish and reckless, but in all the circumstances, I do not think we are called upon to make any order of suspension in his case.

Miller J:—The point of law is not without difficulty, but on the whole I am able to accept the conclusion that we have jurisdiction to make an order in this case. In the first place it is not clear to me that we ought not to read Ss. 12 and 13 together as containing the enumeration of the cases in which orders may be made for the suspension or removal of a pleader; if we do that, S. 13 (*f*) which closes the enumeration with the general words '*for any other reasonable cause*' can be interpreted on the principle of *ejusdem generis* only if we find that the specifically enumerated cases can all be included in one genus or category—*Tillmans* & *Co.* v. *S. S. Knutsford, Limited.*[1] The genus *professional misconduct* is not large enough to include the case of S. 12 and we must seek for something larger, *e.g.*, misconduct generally; this would include the cases before us.

If as is suggested by S. 14, the case of S. 13 (*a*) is not a case of misconduct, it is difficult to apply the *ejusdem generis* principle at all. But in either case, the present cases are within the Act. If I am wrong in this view, still it seems to me pretty clear that the intention of the legislature was to give to the High Court power of control over pleaders and mukhtyars equivalent to those which are given by the Letters Patent; it seems unreasonable to suppose that the powers over the inferior classes of practitioners are intended to be less extensive than those given over the superior classes unless there is reason, and none is suggested, to think that the powers given by the Letters Patent were deemed to be too large. I think the use in S. 13 (*f*) of the same words as are used in the same connection in S. 10 of the Letters Patent is a strong indication

1. (1908) 2 K.B. 385.

In re two Second Grade Pleaders.

Miller J.

that they were intended to have the same extent, and, if that is so, it is unnecessary to call in any rule of construction to enable us to arrive at the meaning of the legislature. If we give to the words '*for any other reasonable cause*' the widest meaning they can bear in S. 13, we cannot, I think, give them a meaning which is wider having regard to the scope and purpose of the Act, than was intended by the Legislature.

The *ejusdem generis* principle is applied in construing a statute when you have a word which may have a general meaning wider than that which was intended by the legislature [per *Lord Halsbury* in *Yotrady fodnig and Pontypriad Main Sewerage Board* v. *Bensted*[1]] but I do not think that is so here. *Ghose* J., in *Le Mesurier* v. *Wajid Hossain*[2] seems to hold himself constrained by the form in which the statute is framed to hold that the legislature did not intend to give to the High Court the power which he considers is a power which ought to be given; but I do not think the form of the statute is a very safe guide in this matter. It is easy to imagine reasons why the legislature in framing Ss. 12 and 13 of the Act of 1879, may have thought it well to give some enumeration of causes justifying the suspension or removal of a pleader although the Letters Patent contain no such enumeration, but it is not easy, and the form of the statute does not compel us to hold, that the intention was to give the High Courts less extensive power over pleaders than over advocates and vakils.

I think too there is much to be said for Mr. Rosario's contention that clauses up to (*c*), notably (*b*), of S. 13 exhaust the genus professional misconduct and, consequently, the words in clause (*b*) must be referred to a more extensive genus. I think we have jurisdiction to make an order in this case and on the merits I agree with the order proposed by the learned Chief Justice.

Krishnaswami Aiyar J :—* * * *C. V.* and another, both pleaders of the 2nd grade, were convicted of criminal breach of trust by the Sessions Judge of Guntur and acquitted on appeal by this Court. Notices were issued to them to show cause why they should not be dealt with under S. 13 of the Legal Practitioners Act. They have appeared by their vakils. The first question raised for consideration is whether clause (*f*) of S. 13 is confined to professional misconduct or may be interpreted so as to include any dishonest or dishonourable conduct whether

1 (1907) A. C. at 268. 2. (1902) I.L.R. 29 C. 890.

In re two Second Grad Pleaders.

Krishnaswami Aiyar, J.

or not in the discharge of professional duty. It must be admitted that the question is not free from difficulty. But having given to the matter my best consideration I feel no hesitation in expressing my agreement with the learned Chief Justice. The question was considered in this Court in *In the matter of a pleader*[1]. The *Chief Justice* and *Moore* J. expressed their concurrence in the view of the majority of the Calcutta High Court in *In the matter of Purna Chander Pal, Mukhtar*[2], where it was held that the words "for any other reasonable cause" in clause (*f*) should not be given a restricted interpretation confining it to professional misconduct on the doctrine of *ejusdem generis*. The Calcutta Court reaffirmed its view after a more elaborate consideration in *Le Mesurier* v. *Wajid Hussain*[3] in Full Bench, Mr. Justice *Ghose* dissenting. In *In re Ganapathi Sastri and Krishnasami Iyer*[4] the same view was taken by the *Chief Justice* and *Benson* J., though having regard to the conclusion they arrived at upon the facts it was unnecessary to decide the point. Mr. Justice *Miller* and Mr. Justice *Sankaran Nair*, however, reserved their opinion. Reference was made to several other cases in the course of the argument, bnt they have no bearing on the question under consideration. The decision in *In re Wallace*[5], in *In the matter of a First Grade Pleader*[6] and in *In re* a *Pleader*[7] turn upon the ground that acting as a suitor and using disrespectful language towards the Court or committing contempt of Court is properly dealt with as a suitor and not as a legal practitioner. They do not help us in determining the meaning of clause (*f*) of S. 13 of the Act The decision in *In re Quarry*[8] also reported in 13 Allahabad 93 on which some reliance was placed by the dissenting Calcutta Judge, Mr. Justice *Ghose*, was brought to our notice. But I am unable to agree that that case is of any assistance. There certain correspondence of a pleader with the opposite party to his former client was held by their Lordships of the Privy Council to afford ample evidence that the pleader in his professional capacity was guilty of grave improprieties which amounted to

1. (1903) I. L. R. 26 M. 448.
2. (1900) I. L. R. 27 C. 1023.
3. (1902) I. L. R. 29 C. 890.
4. (1909) 19 M. L. J. 504.
5. (1866) L. R. I.P.C. 283.
6. (1901) I. L. R. 24 M. 17.
7. (1908) 18 M.L.J. 184
8. (1890) 17 I.A. 199 s. c. I. L. R. 13 A. 93.

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reasonable cause for his suspension under S. 13 of the unamended Act XVIII of 1879. Their Lordships had no occasion to consider whether dishonourable or dishonest conduct which was not in the discharge of professional duty would fall within the purview of "reasonable cause" in S. 13. *In the Matter of Parnathi Charam* [1] related to the case of a vakil of the High Court and *In re Sarbadhikari* [2] to that of an advocate. Both these cases fell under the Letters Patent by which an advocate or vakil could be removed or suspended from practice "on reasonable cause." The acts charged against them were connected with the discharge of their professional duty. But having regard to the language of the Letters Patent no question could arise like the one with which we have to deal in the present case. The case in *In the matter of Ahsan Ali* [3] was decided in favour of the pleader upon the facts. It was there held that he was the victim of a deception in withdrawing monies to one who personated the client and that when he afterwards negotiated with the client on the mistake being discovered for acceptance of a reduced sum in discharge of the liability his conduct could not be said to have been grossly improper. These were all the cases to which our attention was invited.

It is clear that the Calcutta High Court in Full Bench, with the exception of Mr. Justice *Ghose*, and three learned Judges of this Court have expressed themselves in favour of the unrestricted interpretation of Clause (*f*) S. 13. I have asked myself the question whether there is sufficient reason for a departure from this trend of authority. The elaborate Judgment of Mr. Justice *Hill* in the Full Bench case of *Le Mesurier* v. *Wajid Hossain* [4] covers nearly the whole ground of the reasoning which must determine the conclusion. I do not, therefore, think it necessary to dwell in detail upon the steps by which I have arrived at the same conclusion. But having regard to the importance of the question I have thought it right to indicate in a few words what has inclined me to adopt the same view.

The question must be answered with reference to the language of the Act apart from any decisions in England, however useful and instructive they may be as regards the principles on

1. (1895) I. L. R. 17 A. 499.
2. (1907) I. L. R. 29 A. 235.
3. (1908) 5 A. L. J. 126.
4. (1902) I. L. R. 29 C. 890.

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which the rules laid down by the Indian Legislature may be based. It seems difficult in the first place to limit Clause (*f*) to professional misconduct because Cl. (*b*) deals with 'grossly improper conduct' in the discharge of professional duty and it is not possible to name any species of professional misconduct which does not fall within the clause (*b*) itself. If it is suggested that the misconduct referred to in Cl. (*f*) need not be of a flagrant type which the words 'grossly improper conduct' indicate, I must confess that the division of misconduct in clauses (*b*) and (*f*) into two species is altogether unnecessary and the object aimed at could have been achieved by the enactment of a single clause which would comprise both the classes of misconduct. Again it must be remarked that when the Legislature intends to strike at any species of professional misconduct by Cl. (*f*) there is no point in selecting fraudulent and grossly improper conduct in the discharge of professional duty for special condemnation. The doctrine of *ejusdem generis* which has been invoked for the limited interpretation of clause (*f*) is not of universal application.

Hardcastle on *Statutory Law* quoting *Anderson* v. *Anderson*[1] makes the following remark:—"But the *ejusdem generis* rule is one to be applied with caution and not pushed too far as is the case in many decisions which treat it as automatically applicable and not as being what it is, a mere presumption in the absence of other indications of the intention of the Legislature and where the words are clearly wide in their meaning they ought not to be qualified on the ground of their association with other words." Clauses (*a*) to (*e*) of S. 13 are not particular cases of one genus. Each of them may well be regarded as a group dealing with a distinct branch or subject by itself and in such a case the general words of Cl. (*f*) cannot be controlled by *ejusdem generis* rule. *Wilberforce* on *Statutes*, at page 185, says that "where the particular words exhaust a whole genus, the general words must refer to some larger genus"—*Fennuck* v. *Schmaly*[2].

In *Maxwell* on the *Interpretation of Statutes* the idea I have sought to convey is pointedly expressed at page 509. "The general principle in question applies only where the specific words are all of the same nature; where they are of different genera the meaning of the general word remains unaffected by its

1. (1895) 1 Q. B. 749. 2. L. R. 3 P.C. 315.

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connection with them." The learned author makes reference to two cases which illustrate the principles of the passages above cited. In *Regina* v. *Payne*[1] it was held that " any other article or thing" in the clause making it penal to convey to the prisoner " any mask, dress or disguise of any letter or any other article or thing" included a crow-bar because the words "disguise" and "letter" exhausted the whole genera ; and in *Regina* v. *Edmundsen*[2] it was held that a warehouse a mile and a half distant from a dwelling house was included in the words "other place," when search warrants were authorised for suspected articles in "any dwelling house, outhouse garden or other place " on the ground that it was reasonable to suppose, having regard to the preamble and general intention of the Statute, that the warehouse was in the contemplation of the legislature as it was a very likely place for the concealment against which the enactment was directed and a narrower construction would have restricted the effect, instead of promoting the object of the Act. *Stroud* in his *Judicial Dictionary*, in the notes on the interpre-pretation of the word "other" qualifying a general word at the end of a series of particular words, observes : " It is perhaps impossible to lay down any workable rule to determine which of these interpretations the word should receive in any case not already covered by authority " and classifies a number of cases under the head of " nnrestrictedly comprehensive interpretation in the sense of " every other sort or kind." If we look at the law in England and the history of the legislation in India it seems to me that the larger interpretatiou of the phrase " for any other reasonable cause" is more in accordance with the intention of the legislature. If a solicitor is convicted of a crime involving moral turpitude, even though it has no connection with his professional duty, he is liable to be struck off the rolls ; *In re Weare*[3]; this rule corresponds to S. 12 of the Legal Practitioners' Act. It is also the law in England, where the misconduct is in character criminal though no indictment has been preferred or where a conviction has been quashed because the prisioner's admissions were wrongly received inevidence or even where a solicitor hasobtained a verdict of not guilty that the solicitor may be punished by suspension or by striking off

1. (1866) L.R.1.P.C. 27 2. (1859) 2 Ellis and Ellis. 77.
3. (1893) 2 Q.B. 439.

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the roll. *Cordery* on *Solicitors,* page 177. In *In re Hill* [1](where an attorney acted as a clerk to a firm of attorneys and appropriated to his own use the balance of purchase, money which he received in the sale of certain property, the Court suspended him for the misconduct in the exercise of its summary jurisdiction though it was not in his strictly professional character) Chief Justice *Cockburn* observed at p. 445: "When an attorney does that which involves dishonesty it is for the interest of suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as an attorney of the Court. In this case if the delinquent had been proceeded against criminally upon the facts admitted by him it is plain that he would have been convicted of embezzlement and upon that conviction being brought before us we should have been bound to act. If there had been a conflict of evidence upon the affidavits that might be a sufficient reason why the Court should not interfere until the conviction had taken place. But we have the person against whom this application is made admitting the facts." Mr. Justice *Blackburn* said: "In the present case I adhere to what I think is the effect of *Re Blake* [2] that although the misconduct is not directly or incidentally connected with his character as attorney still we must consider what effect that has upon the question of a proper person to be an officer of the Court." If this be the law in England, what reason is there to suppose that a different standard is adopted in India where there is more reason to guard the profession from the influx of questionable characters to whose machinations a more ignorant *clientele* is certain to be exposed? The Letters Patent of the High Courts were issued on the 14th May 1862 and they gave the High Courts unrestricted powers 'to remove or suspend from practice advocates, vakils and attorneys on reasonable cause,' a phrase only to be interpreted in the light of English decisions. It has not been suggested that under the Letters Patent an advocate, vakil or attorney is only liable to be dealt with for misconduct in the discharge of professional duty. To use the language of Lord *Westbury* in *In re Wallace*[3], "if an attorney be found guilty of moral delinquency in his private character" he may be struck off the roll under the Letters Patent. The amended Letters

1. (1866) L.R. 3 Q. B. 444. 2. (1860) 3 Ellis and Ellis 34.
3. (1866) L. R. 1. P. C. 283.

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Patent were issued on the 28th of December 1865. In the same year Act XX of 1865 was passed, by S. 15 of which it was enacted as follows :—" The High Court may also, after such enquiry as it may deem proper, suspend and dismiss any pleader or mukthyar enrolled as aforesaid who shall be guilty of fraudulent or grossly improper conduct in the discharge of his professional duty or for any other reasonable cause." This section came up for consideration before *Glover* and *Kemp* JJ. in *In the matter of the petition of Gholob Khan* [1]. The learned Judges were of opinion that the words " for any other reasonable cause" referred to cases other than professional misconduct. Gholab Khan had been acquitted of the charge of instigating a dacoity against the opinion of the assessors. The High Court did not agree in the propriety of the verdict. Though no further action was taken against him in the criminal case both the learned Judges agreed in striking the name of Gholab Khan off the rolls. Act XVIII of 1879 reproduced, in the third para of S. 13, the language of S. 15 of the older Act and there is no reason to suppose, notwithstanding the addition of a clause about taking instructions in any case except from the party on whose behalf the pleader is retained, that there was any change of intention on the part of the Legislature so as to curtail the power of the High Court in dealing with the misconduct of a pleader which was other than professional. By the amendment of 1896 a number of cases which were penalised by S. 36 of the Act, were brought in as Cls. (*c*) (*d*) and (*e*) of S. 13, and the clause as to fraudulent or grossly improper conduct in the discharge of professional duty or any other reasonable cause was split up into clauses (*b*) and (*f*) of the section. This manipulation on the part of the Legislature does not show any change of intention as regards the meaning of the phrase 'other reasonable cause.' It can hardly be supposed that pleaders of subordinate courts are intended to be dealt with more lightly than practitioners of the High Court. And the intention of the Legislatnre appears throughout to be consistent in giving a free hand to the High Courts in dealing with the delinquency of professional men. It was argued that S. 14 of the Act which limits the authority of subordinate

1. (1871) 7 B. L. R. 179.

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courts in the inquiry into the conduct of professional men to cases where they are charged with taking instructions except as aforesaid or with any such misconduct as aforesaid indicates a limitation of the scope of clause (*f*) of S. 13. The marginal notes to Ss. 13 and 14 were also relied on. The note to S. 13 runs as follows.—"Suspension and dismissal of pleaders and mukthyars guilty of unprofessional conduct." And the note to S. 14 runs: "Procedure when the charge of unprofessional conduct is brought in subordinate courts or revenue offices." It is to be observed in the first place that a marginal note cannot be exhaustive of the contents of the section. "Is it not a mere abstract of the clause intended to catch the eye?" said *James* L.J. in *Attorney General* v. *Great Eastern Railway Co.* [1]. In the next place marginal notes have not the authority of the legislature like the body of the sections so as to justify the controlling of the meaning of the sections by the language of the notes—see *Maxwell*, page 62, and *Punardeo Narain Singh* v. *Ram Sarup Roy.* [2] As regards the argument that subordinate Courts have only a restricted power it may be said that the Legislature so intended to restrict it while the scope of the enquiry of the High Court itself was left unfettered. This was the view taken in *In the matter of the petition* of *Gholab Khan Mukhtyar* [3]. It has also the support of the Privy Council in an observation in *In the matter of Sonthekul Krishna Row* [4]. Sir *James Hannen*, delivering the Judgment of the Judicial Committee, reads S. 14, when it speaks of "any such misconduct," as referring to misconduct in the discharge of his professional duty and not to misconduct included in the phrase 'any other reasonable cause.' Mr. Justice *Hill* who delivered the leading judgment in *Le Messurier* v. *Waji Hossain* [5] expressed himself in *In the matter of Purna Chander Pal* [6] as inclined to take the view that taking instructions and misconduct referred to in S. 14 related to Clauses (*a*) and (*b*) respectively of S. 13 of the Act. If this view were correct it would follow that cases falling under Cls. (*c*) to (*e*) as well as those that come within clause (*f*) of S. 13 would lie outside the purview of subordinate Courts to enquire into. It is necessary that I should express an opinion

1. (1897) 11 Ch. D. 449 at p 465
2. (1898) I. L. R. 25 C. 858.
3. (1871) 7 B. L. R. 179.
4. (1887) 14 I. A. 154.
5. (1902) I. L. R. 29 C. 890.
6. (1900) I. L. R. 27 C. 1023.

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as to whether misconduct in S. 14 should be understood in such a restricted sense. But it seems to be clear that there is no warrant for cutting down the meaning of the phrase 'for any other reasonable cause' in the light of the circumstance that the authority of the subordinate Courts under S. 13 is more restricted. I have therefore no hesitation in following the interpretation placed upon the clause in question by the learned Chief Justice. A different interpretation would necessitate the conclusion that rules 23 and 28 framed by the High Court authorising refusal or removal of certificate, for misconduct in any position of trust or responsibility and suspension of a pleader for carrying on a trade or business were *ultra vires.* Having determined the meaning of Cl. (*f*) of S. 13, I proceed to enquire whether the pleaders have rendered themselves liable to punishment.

It is unnecessary to set out the facts here as they have been fully examined and dealt with by my brother *Abdur Rahim* J. in his judgment in the criminal appeal. It is not seriously argued that the Circars Provident Fund started, advertised and managed by the pleader before us, was anything but a snare to the ignorant and unwary public. The Company was limited by guarantee in the ridiculously low sum of Rs. 5 per head. There were no shareholders. The Directors who numbered seven constituted the members of the Company. They promised by their prospectus, the preface to the Articles of Association and the notice on the back of the flyleaf, to each nominee, on the death of the applicant, at least double the amount of the subscription, if the death occurred after the first 3 months of the applicant joining the fund. Every one had his prize which might range from two to fifteen times the subscription. The Bonus Fund each year available for distribution amongst the nominees of applicants dying in any year was made up only of 8 annas out of every rupee received in the year after 3 months' subscription of each set apart as entrance fees. Every applicant being bound to die sooner or later and speaking broadly there being an obligation to pay the nominee of the applicant at least 4 times each half rupee set apart for the bonus out of every rupee contributed, what was the source available for making up the difference?

The answer is, two annas in each rupee contributed which constituted the Reserve Fund and six pies in each rupee so

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collected which constituted the Guarantee Fund. The profit of the Directors of 3 annas in the rupee would also be generously given up to make up the difference. But how could five annas and a half out of each rupee, if all the resources available were scraped together, meet the minimum liability in excess of the bonus, of one rupee and a half for each rupee received as contribution. The Company could be wound up at any time at the pleasure of the Directors. Let the working of the company be stopped any day and all the outstanding nominees unpaid are bound to suffer loss; and yet the prospectus tells every person that by joining the fund he never stands to lose. There was a note under Rule 14 of the Articles of Association that the special term as to the mininum bonus of double the subscription being made good out of profits was only to be in force till the end of December 1905. But the provision was made permanent in February 1906. This was of course the bait to intending subscribers. That the whole concern was a practical swindle it is impossible to gainsay. The lucky nominees of short-lived applicants had a good game of lottery. So long as fresh subscribers joined in progressive numbers the company might manage to stave off the evil day, and the new capital might pay off the old liability. But the concern was doomed to failure, and the inevitable crash could not be long in coming. As it was it came in about two years and a half though the number of subscribers stood at the time at over 8,000, a flourishing position for any concern conducted on business principles. There was no loss sustained by the company, no untoward event had happened. No speculation had failed and no investments lost. But the number of subscribers did not go on increasing as rapidly as it was necessary for fresh capital to cover the old liabilities and keep up the company's attractiveness to the gamblers on the lives of applicants.

Mr. Rangachariar for the first accused had the courage to argue that the principles of the company were the same as those of life insurance. Yes: there was one thing in common, namely, that sums of money were payable on the death of the insured. But an insurance company would be nothing but a fraud if there was not a variable premium dependent on the chance of each life and if the premiums paid by the assured could never exceed the policy amount. What made failure

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inevitable from the inception was the principle of profit to all subscribers and loss to none with gain to the conductors. The rate of profit was exorbitant and no prospect of interest to be earned on investments could minimise the danger of failure, for only 2½ annas out of every rupee subscribed could be invested at 3½ p. c. The accused have been rightly acquitted of criminal misappropriation of the Company's funds. They made no secret of their claim to the profit provided for by the articles. Every subscriber paid his dues with full knowledge that 3 annas in the rupee and the entrance fee of 3 months' subscription after certain deductions would go into the pockets of the directors. But the question is different as regards the character of the concern itself. If it was bound to end in failure and to inflict grievous loss on the majority of subscribers what is the measure of the responsibility of those who ushered the company into existence and managed its affairs ? We must here discriminate between the first and the second accused. Bapala was the Head Office of the Provident Fund. The second accused lived and practised at Ongole. He was a pleader of about 6 months, standing. In 1906 he got to know that it was unprofessional to continue as a Director of the Fund. He resigned his place and relinquished his profit of Rs. 600 for the year. Under these circumstances it does not seem to me to be taking too favourable a view of his conduct to hold that when he joined the Fund he did so without knowing or having reason to suspect that he was associating himself with a nefarious concern. I agree with the learned Chief Justice that his recklessness in becoming a Director of the Fund without sufficient enquiry as regards its character and inevitable tendency to cause ruin may, in view to the hardships he has already undergone, be dealt with by our merely pointing out his error. As regards the first accused, however, I am inclined to take a more serious view of his conduct. I acquit him of a deliberate intention to deceive the public by misrepresentation of the financial possibilities of the enterprise. I would even go further and assume in his favour that he did not definitely realize in his own mind what a large body of subscribers must inevitabty be swindled out of their monies. But he is a graduate in arts. He is a pleader of some years standing. He was the President of the Fund. He was

intimately associated with its working. It is impossible to believe that he had not abundant reason to know the true character of the business. When the 2nd accused assigned his reason for withdrawal that it was unprofessional to be a Director of the Fund, the first had nothing to say on the subject though his attention was pointedly drawn to it. Mr. Rangachariar asked us to believe that the first accused was merely the dupe of Kondalaiyudu. I am unable to think so. I have no doubt he was a willing party to a scheme calculated to bring him profit at the expense of the ignorant public whom he inveigled into the Company's meshes by representations which he must have known were impossible of fulfilment. We are told that no criminal charge of cheating has been brought against him. But that does not oust our jurisdiction under the Act as I have already pointed out. I do not think that on the facts of this case which have been fully threshed out in a judicial trial, though on a different charge, any useful purpose will be served in directing a fresh prosecution for cheating as preparatory to proceedings under the Legal Practitioners Act, though, as observed by Chief Justice *Cockburn* in a case of conflicting evidence in a matter of a criminal nature such a course would be expedient. I concur in holding that the first accused is guilty of moral delinquency of such a character as to justify the sentence of three months' suspension proposed by the learned Chief Justice.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir R. S. Benson, officiating Chief Justice, and Mr. Justice Krishnasawmi Iyer.

Rajammal .. .. Appellant*
v. (*Plaintiff.*)
Authiammal *alias* Athi Lakshmiammal and others .. .. Respondents (*Defendants*).

Rajammal v. Authiammal.

Will—Settlement—Deed—Construction—Tests—Form—Registration—Future tense, use of—Life estate, reservation of.

A deed in form purported to be an agreement and was registered. It contained no clause of revocation and declared that the executant's future debts will not be

* S. A. 171 of 1907. 21st October 1909.

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binding on the properties ; and the instrument went on to provide "after my life time both of you " (wife and daughter in law) " shall not only get the right due to me in the said lands but also divide and enjoy in equal shares the income." *Held*:— That the instrument was a settlement and not a will.

One of the invariable tests in determining whether an instrument is testamentary or not is to see whether it is revocable.

The use of the future tense is not a conclusive test when the intention is otherwise clear ; nor even the reservation of a life estate will render a settlement the less so.

The form of the instrument and the fact that it was registered, though matters to be taken into account, are not in themselves conclusive as to the determination of the character of the instrument.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 10 of 1906 presented against the decree of the Court of the District Munsif of Poonamallee in O. S. No. 144 of 1905.

Plaintiff instituted a suit as the person entitled in remainder to half the properties after the death of her father-in-law under an instrument executed by him on 18th December 1895. Objection was taken to the maintainability of the suit on the ground that no probate was taken of the instrument. The instrument was executed in Madras, and as such, if the instrument were construed to be a will, was subject to the Hindu Wills Act. The material terms of the instrument Exh. A were as follows :—

" I shall transfer the puttah of the lands and the salt pan hereunder described in the name of you both nominally and give you Rs. 5 each every month till I die, and after my death you shall not only have the rights I have in the said lands and salt pan but also the profits accruing therefrom in proportionate shares after paying the Sirkar kist in moieties, and I shall dispose of the dwelling house which stands nominally in the name of my wife, and after paying out of the sale proceeds the money due to Vasa Baliah Chetti, I shall pay the balance towards the debt of Rs. 1,650, and I shall clear the remaining debt out of the pension I get every month, and these properties are not liable to the debt which I may hereafter incur, and I shall take back from Rajammal the jewel *vairamani* I have given her and give it to my wife Authilatchmiammal after giving Rajammal's jewels worth Rs. 400. I execute this document so that there may be amicability among ourselves at the close of my days. I shall enjoy the lands and the salt pan though the puttahs for them are made in the name of you both. The salt pan will be sold."

Rajammal v. Annammal

A. Krishnaswami Aiyer for *P. R. Sundara Aiyar* for appellant.—A is a deed of settlement and not a will, and as such no probate is necessary. The essential test, in the Court deciding whether an instrument is a will or a deed of settlement, is whether the executant continues to have the same rights over the property after the execution of the document as before. If the executant's dominion over the property is in any way curtailed or parted with, the Court will construe the instrument to be a deed of settlement. Under A, the lands are no longer liable for the future debts of the settlor and that cuts down the absolute estate. No doubt if the other terms of the instrument lead the Court to the irresistible conclusion that the executant continues to be the absolute owner, the restraint on alienation or the non-liability for debts may be treated as repugnant to absolute ownership and declared void. But that is not the case here. The settlor makes express provision for past debts and says that the property shall not be liable for his future debts. He reserves to himself only a power "*to enjoy.*"

The form of the instrument and its registration as a deed are also material in the Court deciding the question—*Jarman on Wills* p. 22; see also *In the goods of Robinson*[1].

Some of the provisions being obviously non-testamentary, (see para 3, present dispositions) the Court will lean in favour of the construction that the instrument is to operate *in presenti.*

The absence of a power of revocation and the fact that no executors are appointed under the instrument are strong indications that the instrument is not a will—*Jeffries* v. *Alexander*[2] overruling *Attorney-General* v. *Jones*[3]. The question in that case was whether a certain covenant was not hit at by the Mortmain Acts. In *Fletcher* v. *Fletcher*[4] a document containing a covenant that 6,000 Rs. was to be paid over to a certain person, was construed to be a deed of settlement.

The mere use of the future tense or other inappropriate language does not make the instrument a will. In *Johnston* v. *Mappin*[5] the question was whether a certain marriage settlement was revoked by a subsequent settlement–*Kekewich* J. held in the negative. The mere fact that there is a reservation of a life estate and there

1. (186[illegible]) L. R. 1 P. and D. 384 2. (186[illegible]) 11 E. R. 862 at 881 S.C. 34 L. C. 594.
3. (1817) 3 Price 368. 4 (1844) 67 E. R. 564.
5. (1891) 64 L. J. 48 at 51.

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is a disposition over does not make the instrument a will. See *Thompson* v. *Browne*[1]; *Rambhat* v. *Lakshmana Chintaman Mayalay*[2]; *Collector and Superintendent of Stamps*[3].

Respondent *unrepresented.*

The Court delivered the following

JUDGMENT :—The question in this case is whether the instrument, Exhibit A, is a settlement or a will. In form it purports to be an agreement executed by Nilakanta Pillai to his wife and his son's widow. This is a circumstance to be taken into account, although as observed in *Rambhat* v. *Lakshmana Chintaman Mayalay* [2] "this, *per se*, is not much." It has been registered as a settlement. In *Marjoribanks* v. *Hovenden*[4], as observed by Jarman, "the fact of registration as a deed appears to have been deemed almost conclusive against its testamentary character." [See *Jarman* on *Wills*, 5th Edn., Vol. 1, page 22]. Without giving the same effect to registration in this country it is at least permissible to hold that that is also a circumstance to be taken into account. Going to the provisions of the instrument, it is to be observed that there is no reservation of a power of revocation. It may be doubted whether the same importance should be attached here to the absence of a power of revocation as in England where testamentary instruments are generally drawn by solicitors. (See, however, *Jeffries* v. *Alexander*.[5]) The author of the instrument promises to transfer the putta for the lands and the license for the salt pans to the names of his wife and his son's widow. He provides for the kist of the lands being paid and the materials for the salt pans being supplied by both. He makes a gift of jewels to his wife and his son's widow or promises to do so. Above all he declares that his future debts shall not be binding on the properties. Some of these can be said to be provisions of an ambulatory character. The fact that some of these are expressed to operate in the future cannot affect the character of the instrument as a settlement. As observed by *Kekewich* J. in *Jonstone* v. *Mappin*[6] at page 51 : "There is no magic in the use of the future tense which is frequently employed to express a present contract and if on the construction of the

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1. (1835) 3 My. & K. 32. s. c. 40 E. R. 13.
2. (1881) I. L. R. 5 B. 630 at 631.
3. (1895) I. L. R. 20 B. 210.
4. (1843) Dru. 11, s. c. Ir. Eq. R. 238.
5. (1867) E. R. 562 at 581.
6. (1891) 64 Law Times 49 at p. 51.

whole instrument the true conclusion is that a present complete settlement was intended, then I take it the intention must prevail notwithstanding it be expressed in inappropriate language." The only problem is whether the instrument partakes of a testamentary character only by reason of the following clause: "After my lifetime, both of you shall not only get the right due to me in the said lands and the said saltpans,but shall also divide and enjoy in equal shares the income derived therefrom." As observed by *Sarjeant* C. J. in *Reference by the Collector and Superintendent of Stamps, Bombay*:[1] "Even the reservation of a life estate by the settlement does not render the instrument less a settlement." It is provided in Exh. A that Rs. 5 a head shall be paid during the period of the settlor's life-time, apparently out of the profits of the property. It was observed by Sir J. P. *Wilde* in *In the goods of Robhinson*[2]: "The first difficulty that arises is, that the Court is asked to deal with a portion only of a document, and declare it to be testamentary. I have met with no case where that has been done, although I by no means say that it could not be done." These remarks appear to us to be applicable to the present case in that there are clear provsions having an immediate operation.

One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable. We are satisfied that Exh. A is not. The decision in *Lakshmi* v. *Subramanya*[3] has no application. There the governing words with which the instrument begins are: "What should be done by my adopted son and my wife after my life time."

In *Thakur Ishur Singh* v. *Thakur Baldeo Singh*[4] their Lordships of the Judicial Committee set out at page 800 the indicia of a will in that case. This case does not apply either. We must reverse the decrees of the Courts below and remand the case to the District Munsif for disposal according to law. Costs will be provided for in the revised decree.

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1. (1895) I.L.R. 20 B. 210 at 214.
2. (1867) 1 P. and D. 384 at 386.
3. (1889) I.L.R. 12 M. 490.
4. (1884) I.L.R. 10 C. 729.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Sevugan Chetty .. Appellant*

(*Defendant*)

v.

Obla Munisami Aiyar & others .. Respondents

(*Petitioners and legal representatives of 4th Petitioner — attaching creditors and Plantiffs*).

Sevugan Chetty v. Munisami Aiyar

C. P. C. (Act XIV of 1882) *S.* 109—" *Opposite party*"—*Attaching creditor of decree—Notice not necessary.*

An attaching creditor of a decree has no interest in the decree within the meaning of S. 372, C. P. C, and when his name does not appear on the record he is not an "opposite party" within the meaning of S. 109, C. P C., so as to be entitled to notice.

Obiter :— He is a representative of the decree-holder for purposes of execution within the meaning of S. 244, C. P. C., 1882, and is entitled to apply for execution.

Appeal from the decree of the District Court of Madura in A. S. No. 695 of 1907, presented against the order of the Court of the District Munsif of Madura, in M. P. No. 881 of 1906, in O. S. No. 562 of 1903.

A, the decree-holder against *B*, attached a decree for money in *B's* favour against *C* who was *ex parte* in the case. After the attachment *C* got the *ex parte* decree set aside and compromised his suit without notice to *A*. *D* then again attached the *ex parte* decree against *C* as if it was alive.

R. Kuppusami Aiyar for appellant.

C. V. Anantakrishna Aiyar for respondents.

R. Kuppuswami Aiyar.—An attachment does not create a right in the thing attached. Only if a transfer or assignment of the decree has been made I am bound to give notice to the transferee—*Chait Behari* v. *Rahmat Das* [1]; *Sambasiva* v. *Veera Perumal* [2]; *Jotendra Mohun* v. *Raja Srinath Roy* [3]; *Ganpat Shah* v. *Ramchand.* [4]

C. V. Anantakrishna Aiyar.—If a finding on the question of fraud is necessary I have no objection. An attaching decree-holder is entitled to notice. *Chait Behari* v. *Rahmat Das* [5] has not been followed anywhere, and Order 22, Rule 10, of the New Code has overruled the view therein. An attachment, though

*A.A.A.O. No. 56 of 1908. 19th April 1910.

1. (1897) I. L. R. 20 A. 38.
2. (1904) I. L. R. M 361.
3. (1898) I. L. R. 26 C 267.
4. (1905) I. L. R. 22.
5. (1897) I. L. R. 20 A 38.

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it is not an assignment, is a 'devolution of some interest on the thing attached—*Sankaralinga Reddi* v. *Kandasami Tevan* [1]; *Gopal Nana Shet* v. *Joharimal.* [2] An attaching creditor is the representative of the decree-holder for the purpose of execution—*Krishnan* v. *Venkatapathi Chetty.*[3] [*Rahim* J.—Had the judgment-debtor notice of the attachment ?] No.

The Court delivered the following

JUDGMENT :—We are not prepared to accept the view taken by the District Judge that the 'opposite party' in S. 109 of the Civil Procedure Code of 1882 includes a person who has attached the *ex-parte* decree in question. The plain meaning of the section seems to be that only the party on record is entitled to the notice mentioned in that section. It is well established that an attaching creditor, even of a money decree, is not an assignee of the decree nor has he a charge upon it. He is entitled, no doubt, to apply for execution of the decree so attached for the satisfaction of his own decree, and for that purpose he may well be deemed to be representative of the decree-holder within the meaning of S. 244 of the Civil Procedure Code of 1882 as held in *Krishnan* v. *Venkatapathi Chetti.*[3] But that does not show that he has an interest in the decree within the meaning of S. 372 of the Civil Procedure Code of 1882. In *Chail Behari Lal* v. *Rahmal Das*[4] it was decided that an attaching creditor of a decree is not entitled to be made a party to an appeal against the decree attached by him, and we think that the principle of that decision is applicable to this case. There is still, however, the question to be decided whether the proceedings which led to the setting aside of the decree attached by the respondents in this appeal were not collusive and fraudulent, instituted with the object of defeating the rights of the respondents, and on this point we have no finding of either Court. We, therefore, direct the District Judge to return a finding on this question. He is to allow the parties to adduce fresh evidence if they chose to do so.

The finding should be submitted in eight weeks, and ten days will be allowed for filing objections.

1. (1907) I. L. R. 483. 30 M.
2. (1891) I. L. R. 16 B. 522.
3. (1905) I. L. R. 29 M. 311.
4. (1890) I.L.R. 20 A. 38.

Serugan Chetty v. Munisami Aiyar.

In compliance with the above order, the District Judge of Madura submitted that there is no reliable evidence to prove and no circumstances from which it can be presumed that the proceedings which led to the setting aside of the decree in O. S. 562 of 1903 were collusive or fraudulent, instituted with the object of defeating the rights of the attaching creditors (respondents in the High Court.)

This appeal coming on for final hearing after the return of the finding of the lower appellate Court, the Court delivered the following

JUDGMENT :—We accept the finding, and reversing the order of the District Judge, we restore that of the District Munsif with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Suri Venkata Subbaraya Sastri .. Appellant*
v. (*Plaintiff.*)
Darappareddi Kristnaiya and others .. Respondents
(*Defendants.*)

Subbaraya Sastri v. Kristnaiya.

Landlord and tenant—Occupancy right—Stipulation not to touch the land without obtaining a cowle for the next fasli—Ejectment suit—Onus.

In an ejectment suit by an inamdar the onus is on the plaintiff to prove his title to eject.

A stipulation by the ryot that he will not touch the land without obtaining a fresh cowle from the landlord is merely an undertaking on his part that he will not commence to cultivate it in the next year without first obtaining a cowle, and is perfectly consistent with a right of occupancy.

Second appeal from the decree of the Subordinate Judge's Court of Kistna at Masulipatam in A. S. No. 711 of 1899 presented against the decree of the Court of the District Munsiff of Gudivada in O. S. No. 324 of 1897.

P. R. Sundara Aiyar and *P. Nagabhushanam* for appellants.

V. Krishnaswami and *V. Ramesam* for respondents.

The Court delivered the follwing

JUDGMENT :—It appears that these lands were held by Timmalapally Ramakrishnamaiya and others, but as to when they got possession there is no evidence. They fell into arrears and

*O. S. A. No. 1156 of 1900. 20th August 1902.

Subbaray Sastri v. Kristnaiy

Meruvu Gopalaswami, the vendor to the defendants, was allowed to come into possession of the lands on condition of his paying the arrears. Such being the case it must be assumed that Meruvu Gopalaswami continued to hold the lands on the same terms as his predecessors. In 1891 Meruvu Gopalaswami sold his rights over the lands to the defendants. The plaintiff is a purchaser from an Inamdar, but it is not alleged or proved that the lands themselves were given to his vendor as Inam, or, in other words, that the kudivaram or any portion of it was granted to him as Inam. There is consequently no presumption that the predecessors in title of the defendants derived their title to the kudivaram from the Inamdar. Such being the case the Subordinate Judge has rightly thrown on the plaintiff the onus of proving that he is entitled to eject the defendants. The appellant relies on Exhibits *J* and *H* 4 as shewing that the defendants are only yearly tenants. We do not consider that these documents establish the character of the tenancy of the defendants. In Exh. *J* (Dec. 1883) Meruvu Gopalaswami, the vendor to the defendants, recites the amount that he is bound to pay as kist for Fasli 1293 and concludes by saying that after the end of the Fasli he will not touch the land without obtaining a fresh cowle. This is merely an undertaking on his part that he will not commence to cultivate in the ensuing year without first obtaining cowle from the Inamdar and is perfectly consistent with a right of occupancy on his part. The same observations apply to Exh. *H* 4 where the tenant states that at the end of the term of 4 years to which that document relates, he shall continue to cultivate the land but shall not enter on the land for the purpose of cultivation till he receives a cowle from the Inamdar. Here again there is nothing, in our opinion, inconsistent with a right of occupancy in the defendant's vendor. As the onus of proving the right to eject was on the plaintiff, and as he has, in our opinion, failed to discharge that onus, we must hold that this second appeal has failed and dismiss it with costs. We remark that the Subordinate Judge should have passed an order either admitting or rejecting the extract from the Inam Register which was produced before him in appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Benson and Mr. Justice Sankaran Nair.

Govinda Parama Guruvu, Trustee of Sree Radha Kanta Swamy's temple at Pudabhadra .. .. Appellant* (*Plaintiff*)

v.

Bothasi Dandasi Pradhanu and others .. Respondents (*Defendants*).

Govinda Parama Guruvu *v.* Dandasi Pradhanu.

Madras Estates Land Act I of 1908, S. 6—Effect of evidence of possession in favour of landlord before the commencement of the Act—Question for consideration—C. P. C., (Act V of 1908) O. 41, R. 33—Appellate Court, powers of.

The only question that arises for consideration under S. 6 of Madras Act I of 1908 in determining whether a ryot in possession of ryoti land acquires occupancy right in it is to see whether the ryot was in possession of the land on the date of the commencement of the Act. *i. e.*, 1st July 1908; and the fact that a decree for possession had been passed before 1st July 1908 in favour of the landlord, does not affect the operation of the section.

The second appellate Court is competent to retain the ryot in possession under the circumstances without driving him to a fresh suit, even though the decree of the lower Court be correct in the view of the law as it stood at the time of the institution of the suit.

Second appeal from the decree of the District Court of Ganjam in A. S. No. 135 of 1906 presented against the decree of the Court of the District Munsif of Sompeta in O. S. No. 698 of 1905.

V. Ramesam for appellant.

P. R. Sundaram Aiyar for respondent.

The Court delivered the following

JUDGMENT:—It may be doubted whether the Judge is right in holding that the defendants were occupancy tenants. It is unnecessary to decide that question as we are clearly of opinion that Section 6, Cl. (1), of Act I of 1908, as amended by Act IV of 1909, clearly conferred on them a permanent right of occupancy. The suit was instituted in 1905 and the appeal decree was passed in 1906, and it is contended that the rights of parties are not affected by an enactment subsequently passed, and also that, at any rate, in second appeal we are only entitled to consider the correctness or otherwise of the decree under appeal. The words of the section are quite clear. Section 6 of Act I of 1908 enacts that "every ryot *now* in possession * * of ryoti land" * * shall have a permanent right of occupancy and under Act IV of 1909. Every ryot now in possession shall include every person who, having held land as a ryot, continues in possession of such land at the com-

* S. A. No. 1158 of 1906 May 6th, 1910.

mencement of this Act." The only question therefore for consideration is whether the ryot was in possession of the land when the Act came into force, *i.e.*, on the 1st July 1908. It is conceded that the defendant, a ryot, was in possession of this ryoti land on that date. It is immaterial that a decree for possession had been already passed. We must, therefore, hold that the defendants are ryots with a permanent right of occupancy. It was further contended that the defendants can enforce their claims only in a fresh suit to be brought by them. We think it unreasonable to turn the tenants with rights of occupancy out of possession and refer them to a fresh suit. It leads to unnecessary multiplicity of proceedings. Order 41, Rule 33, of the Code of Civil Procedure, 1908, corresponding to Order 58, Rule 4, of the Judicature Act, enables the appellate Court to enforce the defendants' claim in second appeal. We must, therefore, dismiss the plaintiff's suit for recovery of possession.

Govinda Parama Guruvi v. Dandasi Pradhanu.

But as occupancy tenants the defendants are bound to pay rent to the plaintiff. We shall accordingly direct the District Judge to return a finding on the question what is the rent payable to the plaintiff for the Faslis 1314 to 1318.

Fresh evidence may be taken. The finding should be submitted in six weeks, and seven days will be allowed for filing objections.

In compliance with the above judgment, the District Judge submitted the following:—

For Fasli 1314—7 bandies and 40 nowties of paddy.
For Fasli 1315—7 bandies and 45 nowties.
For Fasli 1316—7 bandies and 30 nowties.
For Fasli 1317—4 bandies.
For Fasli 1318—6 bandies
Their total value is estimated at Rs. 1,384-0-0.

Neither party takes objection to these rates or to the value fixed by the Commissioner. I therefore find that they are correct.

This second appeal coming on for final hearing, the Court delivered the following

JUDGMENT:—We accept the finding, modify the decree of the Court below, and dismissing the suit for possession, pass a decree in favour of the plaintiff for rent as found by the Judge with interest on the estimated value at 6 per cent from this date. Each party will bear his own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Miller and Mr. Justice Sankaran Nair.

Bashiakar and another .. Appellants*
v. (*1st and 3rd Defendants*).

Venkata Vatada Thatha Chariar *alias* Chinnasami Thatha Chariar and others .. Respondents (*1st, 2nd and 4th Plaintiffs*).

Bashiakar v. Thatha Chariar.

C. P. C. Act V of 1908, *S. 9—Suit of a civil nature—Stotrapatam office—Suit for declaration and injunction as to Stotrapatam office—Voluntary offerings—Damages.*

Held that a suit for a declaration that plaintiffs (Vadagalais) are entitled to recite Stotrams in the Conjeevaram Temple and for an injunction restraining the Tengalais from interfering with their Stotrapatam is cognizable by a Civil Court.

Though damages cannot be awarded when the offerings are voluntary, when once the voluntary offerings have been contributed, and the refusal of a person's right to participate in the fund causes damage, the Court will be entitled to award da-mages in those cases.

Appeal from the decree of the District Court of Chingleput in O. S. No. 24 of 1902, dated the 15th December 1903.

T. R. Ramachandra Aiyar and The Hon'ble *T. V. Seshagiri Aiyar* for appellants.

P R. Sundara Aiyar, *T. Narasimha Aiyangar* and *V. V. Srinivasa Aiyangar* for respondents.

The Court delivered the following

JUDGMENT:—The plaintiffs, who are the descendants of one Kotikannikadanam Sri Thatha Desikan of Conjeeveram claim for themselves and others belonging to that family the *stotrapata* miras in the pagoda of Sri Devaraja Swami and the other minor shrines in Conjeeveram. They allege that it is their duty or their right to recite the Sanskrit *stotrams* in praise of these various deities at the times and places referred to in the schedule attached to the plaint. The defendants are some of the Tengalai Brahmins of Conjeeveram and they are sued on behalf of all the Tengalais. They have got the *adyapakam* miras in all those temples, *i. e.*, the right to recite the Tamil *prabandhams*. It is plaintiffs' case that when they recite the *stotrams*, they are disturbed by the Tengalais reciting their *prabandhams*, and they accordingly seek for a declaration of their right to recite the *stotrams* on the occasions

* A. No. 51 of 1904. 1st February 1910.

referred to in the plaint schedule and also for an injunction to restrain the Tengalais from interfering with their *stotrapatam* by themselves reciting the *prabandham* or in any other way. The defendants contended that there is no such office as alleged by the plaintiffs and there was no income or honour attached to such office and that the recital of the *stotrapatam* has been given up after 1882 when their right to *adyapakam* miras was established by the High Court. And they also pleaded limitation. They admitted that before 1882 both Vadagalais and Tengalais together recited *strotrams* during the processions of the deity; but such recitals were always made in rear of the idol and never in front. The District Judge found in favour of the plaintiffs' contention that there is such an office as claimed by them and that the plaintiffs are entitled to recite the *stotram*, not on all occasions referred to in the plaint but on certain occasions which are referred to in the schedule attached to the decree. He also found that office belongs exclusively to the Thathachari family of Conjeeveram to which the plaintiffs belong. He further held that the emoluments are $\frac{1}{88}$ of the cake offering, $\frac{1}{16}$ of the rice offering if the total is less than 10 measures, and if more then $\frac{1}{10}$. He also found there were certain honours attached to the office, and they are *sadagopam* and umbrella. In appeal both parties take exception to the findings of the District Judge, the Tengalais (the defendants) contending that the plaintiffs are not entitled to recite *stotrams* on any of the occasions referred to, and the plaintiffs, on the other hand, maintaining that in the lower Court that they have proved their right to recite on all the occasions referred to in the plaint. It was also contended that no such office as the recitor of the *stotrams* has been established.

It appears from the judgment reported in *Krishnasami* v. *Krishnamma*[1] that the Tengalais and the Vadagalais have been disputing as to the form of the ceremonial worship conducted at Chinna Conjeeveram from the year 1799, as we find that in that year the Collector had to prohibit the Vadagalais from reciting their *mantram* in the pagoda devoted to their own spiritual teacher. There has been continuous litigation from that time till 1900 and the present suit was

1. (1882) I. L. R. 5 M. 313.

Bashiakar v. Thatha Chariar.

instituted in the year 1902. Almost every religious ceremony has been in dispute between the parties. It is, however, settled that the Vadagalais are entitled to recite the *vedas* in all processions behind the idol and also on other occasions when the *vedas* have to be recited. In the lower Court the right of the Tengalais to join even as worshippers was denied, but this contention has not been maintained before us; and it is now settled that the Tengalais may join in *vedaparayanam* as worshippers. It is also finally established that the Tengalais have got the right to *adhyapakam* miras, that is, the right to recite the Tamil *prabandham* in front of the idol on all occasions when the Tamil *prabandham* has to be recited, both at the time of the procession and at services in the pagoda. They obtained a decree in the year 1882 declaring their right to the effect above mentioned and enjoining the Vadagalais not to interfere with the Tengalais in the recital of the *mantram* and the *prabandham* otherwise than as ordinary worshippers. The contention of the plaintiffs now is that the Tengalais are reciting the *prabandham* even at those times when, and at those places where, they (the plaintiffs) are entitled to recite the *stotras* in front of the idol and, the contention of the Tengalais is that this suit is merely an attempt by the Vadagalais to stop them from reciting the *prabandhams* as they are entitled to do in all the processions and also at services in the pagoda. It is conceded on both sides that when the *prabandham* is recited *stotras* cannot be recited and *vice versa*. The question, therefore, that we have to determine is whether on the occasions referred to in the plaint schedule it is the *stotram* or *prabandham* that has to be recited.

The burden of proof, is of course, on the plaintiffs. And it has also to be remembered that the *prabandham* is to the Tengalais what the *vedaparayanam* is to the Vadagalais. In support of their contention that *stotrapatam* is an office, the plaintiffs rely on Exhibit J. This purports to be an extract from some record filed about 1810. Its authenticity was disputed when it was first produced about the same year. The Sudder Amin before whom it was first filed considered it to be genuine. The appellate Court did not act upon it. The parties are not agreed before us as to whether it was found genuine by the appellate Court or not. On certain other occasions when it ought to have

been produced it was not produced, and it is difficult to say at this distance of time whether the original of Exhibit J is genuine or not. The document states that *stotram* is recited in *Panguni* and there is no claim so advanced to recite the *stotram* on that occasion. It refers to two other occasions when the *stotram* is recited, but it is not clear from the document that the recital carries with it any special emoluments. In these circumstances we prefer to base our conclusion in favour of the plaintiffs' contention upon the other evidence in the case.

In 1876, in the suit which was brought by the Tengalais to declare their rights to the *adhyapakam* miras, the Vadagalais raised the same contention that is now raised on behalf of the defendants; and it was held by the High Court in the case in *Krishnasami* v. *Krishnamma*[1] that the suit was one of a civil nature and that the Tengalais were entitled to the declaration of the right which they claimed, that is, the right to the *adhyapakam* miras; and we can see no distinction between *adhyapakam* and *stotrapatam*. The one is as much an office as the other. And if the plaintiffs' case is true, the plaintiffs are as much under the obligation to recite the *stotrams* as the Tengalais were to recite *prabandhams*. The only difference alleged is that, as the *prabandham* stands to the Tengalais on the same footing as the *vedas*, *prabandhaparayanam* must be regarded as compulsory and standing on a far higher footing than *stotrapatam*. We do not think this distinction is material so far as this contention is concerned. It may be that where the offerings are voluntary, damages cannot be awarded, but when voluntary offerings have been actually contributed, then the refusal of a person's right to participate in the fund causes damage which is a natural consequence of the refusal and the Courts are entitled to award damages in such cases. For the reason therefore given in the case in *Krishnasami* v. *Krishnamma*[1] for upholding the contention of the Tengalais in that case, we hold that the suit is one cognizable by a Civil Court.

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[Then their Lordships proceeded to dispose of the case on the merits.—ED.]

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1. (1882) I. L. R. 5 M. 313.

In re Gopalakrishna Heggade.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

In re Gopalakrishna Heggade (*3rd Prisoner*)* Appellant.

Penal Code, Ss. 464, 471—False document—Copy of false document not a false document.

A copy of a false document is not a false document within the meaning of S. 464, I. P. C.

Appeal from the sentence of the Court of Session of the South Canara Division in Case No. 40 of the Calender for 1909.

The appellant in this case was charged with and convicted of the offence of using as genuine a forged instrument knowing it to be forged, under S. 471, I. P. C. The charge against him was that "he used as genuine a certified copy of a forged document (a copy of Register in the Registration office) knowing it to be forged."

S. Swaminathan and *B. Sitarama Row* for appellant.

The Public Prosecutor (*C. F. Napier*) contra.

S. Swaminathan contended that assuming that all the facts alleged against him are true, the accused cannot be convicted of an offence under S. 471, I. P. C. The copy was a genuine copy certified to be such, and it was not the case of either side that the copy had been tampered with. The document would not come within the definition of a forged document.

The Public Prosecutor in reply.

The Court delivered the following

JUDGMENT:—The document, Exhibit *D*, is merely a copy of the alleged false document and does not come within the definition of a false document. The conviction under S. 471, I. P. C., cannot therefore stand.

We set aside the conviction and sentence and acquit the appellant of an offence under S. 471, I. P. C. The bail bonds are discharged.

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* Cr. A. No. 42 of 1910. 12th April 1910.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Naganada Iyer *alias* Eswarappier .. Appellant* (*Plaintiff*)

vs.

Krishnamurti Iyer and others .. Defendants (*Respondents* 1 *to* 43).

Naganada Iyer v. Krishnamurti Iyer.

C. P. C. (Act XIV of 1882) Ss. 42, 43, 102, 103, 157—Cause of action, meaning of—First suit dismissed for default—Second suit on alternative claim—Maintainability.

There is nothing in the language of S. 158, C. P. C. (Act XIV of 1882) which precludes its application to a case where the plaintiff does not appeal. S. 158 generally empowers the Court, under the circumstances mentioned therein, to decide the suit whether the party at whose instance the adjournment was granted is present or not at the date fixed for hearing.

[*Srimant Sagaji Rao v. S. Smith*[1] doubted.]

The cause of action in a suit has no relation to the character of the relief prayed for by the plaintiff any more than to the defence which may be set up by the defendants ; and it is open to a Court to look into the pleadings, and the issues raised in each case to determine the true cause of action.

[*Chand Kour v. Partab Singh*[2] followed and commented on.].

Mere difference in the form of statement or in the relief prayed for cannot make the causes of action different in law ; and it can make no difference in principle how the plaintiff has shaped his title in the second suit if he was in a position at the time of the prior suit to base his claim on the alternative titles which he puts forward in the second suit ; and Ss. 42 and 43. C. P. C. (Act XIV of 1882) will still be a bar to the second suit if the causes of action in both the suits are substantially the same. One test which may be usefully applied in order to see whether the causes of action are the same in the two suits is whether Ss. 44, 45, 46 and 47, C. P. C. (Act XIV of 1882) would have any application to the case.

On the death of *S*, the plaintiff brought a suit for an injunction restraining the defendants from interfering with the possession, which he alleged, he had through tenants. The suit was not a declaratory suit nor one based on mere possessory title, but the entire scope of the suit was to obtain a decision that the plaintiff succeeded to the property on the death of *S*. The suit was dismissed for default. The plaintiff brought a second suit for possession basing his title to the properties as heir entitled to succeed to them on the death of *S* whether in the view that the property belonged to *S* absolutely or to her husband *N* who predeceased her. In the former suit, he based his title on his right to succeed to the property on the death of *S* as the reversioner of *N*, the husband of *S*.

Held :—(1) That the causes of action in both suits were the same and that the second suit was barred by S 103, C. P. C.

(2) That Ss. 42 and 43 of the Code of 1882 were a bar to the second suit.

Appeal from the decree of the Subordinate Court of Kumbakonam in O. S. No. 61 of 1903.

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* A. No. 128 of 1905. 15th March 1910.

1 (1895) I.L.R. 20 B. 736. 2. (1888) I. L. R. 16 C. 98.

Naganada Iyer v. Krishnamurti Iyer.

K. Srinivasa Aiyangar for appellant.

T. R. Ramachandra Aiyar, *T. Rungaramanuja Chariar*, *T. Natesa Aiyar*, *T.R. Venkatrama Sastri*, *T. R. Krishnaswami Aiyar*, *S. Srinivasa Aiyar* and *M. Subramania Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—*Abdur Rahim* J.:—This appeal is by the plaintiff in Original Suit No. 61 of 1903, against the judgment of the Subordinate Judge of Kumbakonam dismissing the suit. One of the grounds on which the learned Judge proceeded was that the present suit was not maintainable by reason of Original Suit No. 7 of 1892, instituted by the plaintiff against one Srinivasa Iyer, predecessor-in-title of the present defendants having been dismissed by the Subordinate Judge of Negapatam on the 1st November 1892. He holds that the previous suit was disposed of under Sections 157 and 102, Civil Procedure Code of 1882, and the bar arises by reason of S. 103, Civil Procedure Code of 1882. But the learned vakil for the 74th defendant urges that the first suit was decided under S. 158 of the Code, and the present suit is, therefore, barred on the ground of *res judicata*. The contention on behalf of the appellant is that the dismissal of the previous suit was under S. 102, as held by the Court below, but that the causes of action in the two suits were not the same. If the plea in bar either under S. 103, or by reason of *res judicata*, is sustainable, it would be unnecessary to go into the question of limitation, the only other question raised in the appeal.

The property, to which both the suits relate, consists of certain villages. In the plaint in the suit of 1892, it is alleged that the villages belonged to one Narayanasawmy Aiyar, senior paternal uncle of the plaintiff; that he died about twenty-four years ago and, after his death, the villages remained in the enjoyment of Narayanasawmi's widow Sellathammal; that, on Sellathammal's death on the 30th August 1891, the plaintiff became entitled to, and came into possession of all her properties including the properties sued for, and that the plaintiff leased the latter properties to several persons in September 1891. It, then, goes

on to allege that "on the strength of some opinion entertained by the revenue anthorities, on an enquiry made by them after the said Sellathammal's death, the defendant who has no claim, for the last one month entered upon the undermentioned properties and has been causing disturbance. Besides, he has been causing disturbance to the plaintiff's enjoyment in several ways by frightening and intimidating the plaintiff's lessees and by instituting criminal complaints etc, against them." In the 6th paragraph of the plaint, it is stated that "whatever might be the nature of the defendant's claim he had no right whatever to wrongfully enter upon the property remaining in the plaintiff's possession." And in the 7th paragraph, the cause of action is alleged to arise in January 1892, "when the defendant began to cause obstruction as against the plaintiff's possession." The relief prayed for is "perpetual injunction restraining the defendant from interfering with the property remaining in the plaintiff's possession."

The defendant in that suit denied the plaintiff's right to, and possession of the land in dispute, contending that the property belonged to one Anappier, the father of Sellathammal; that on his death without male issue it devolved on his widow Parvathammal, and that on Parvathammal's death Sellathammal succeeded to the property. The defendant claimed that on Sellathammal's death, he inherited the property as the sister's son of Anapian. The three material issues framed in the case were (*a*) whether the property belonged to Narayanaswamy, the husband of Sellathammal, (*b*) whether the succession devolved on the plaintiff after the death of Sellathammal and he has been in possession of the property since her death, and (*c*) whether the plaintiff was entitled to obtain the injunction solely on the strength of his possession without making out title to the property. The issues were settled on the 2nd April 1892, and the case was fixed for final hearing on the 26th August, on which date the plaintiff applied for adjournment on the ground that he had not sufficient time to summon his witnesses, and the hearing was postponed to the 11th October. On the 11th October only two out of the 24 witnesses subpænaed by the plaintiff appeared, but neither the plaintiff nor his pleader appeared on that date. The Court, having waited for some time, passed the following

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Abdur Rahim J.

order :—" From the issues above mentioned, it will be seen that the plaintiff's claim is completely denied by the defendants. I should therefore dismiss the plaintiff's suit with costs." An application was subsequently made under S. 103 of the Civil Procedure Code of 1882 to set aside the order of dismissal to the same Judge. He held that the dismissal must be considered to have been made under S. 158 of the Code inasmuch as the case had been adjourned in order to enable the plaintiff to produce his evidence, and he failed to do so, and that therefore the plaintiff had no remedy under S. 103. It is to be noted that the Subordinate Judge does not state that he decided the suit on its merits, which I think he could have done under S. 158. The other course open to him under S. 157, was to dismiss the suit under S. 102 of the Code on the ground that the plaintiff failed to appear. The order dismissing the suit does not mention the section under which it was made. But on reading the order, it would appear to have been made under S. 102, read with S. 157, rather than under S. 158. The Subordinate Judge who heard the application under S. 103, seemed to think that under the circumstances the suit could have been dealt with only under Section 158 ; but that is apparently a wrong view of the law. The plaintiff did not appear at the adjourned hearing and therefore the case fell within the terms of S. 157—*Maharajah of Vizianagaram* v. *Lingam Krishna Bhupati*[1]. I am also inclined to hold, as I have said, that the Subordinate Judge might have dealt with the case under S. 158, if he chose to do so. The view taken in *Shrimant Sagajirao* v. *S. Smith*[2] however seems to be that, where the plaintiff does not appear, the suit cannot be decided under S. 158, even though time had been granted at his request for the purpose of producing evidence or performing any other act necessary for the further progress of the suit. With great respect to the learned Judges who decided that case I am unable to agree in their construction of S. 158. There is nothing in the language of that section which precludes its application to a case where the plaintiff does not appear. Section 158 generally empowers the Court, under the circumstances mentioned therein, to decide the suit, whether the party at whose instance the adjournment was granted is present

1. (1902) 12 M.L.J. 473. 2. (1895) I.L.R. 20 B. 736.

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or not, at the date fixed for hearing, and the judgment in *Shrimant Sagajrao* v. *S. Smith*[1] does not give any reasons in support of a limited construction. It may, however, be that in such cases, the Court ought ordinarily to deal with the suit under S. 157 and not S. 158. Under S. 158 the Court is required, if it chooses to act under it, to go into the questions raised in the action and to decide them on such materials as may be before it. But, as I have said, so far as it appears from the order of the Subordinate Judge in the previous suit, he did not consider the case on the merits, although the suit might have failed because of the inability of the plaintiff to support his allegations by evidence.

The question, then, is whether the cause of action in the present suit is the same as that in the suit of 1892 within the meaning of S. 103. In the plaint in the present suit, which is much fuller than the plaint in the other suit, the plaintiff states that the property originally belonged to Anappier who died in 1836 leaving him surviving his wife Parvathammal and his mother Ammalammal; that before his death Anappier authorised his wife to adopt a son; that after the death of Anappier, his widow gave birth to a posthumous child Sellathammal, and that in 1837 the widow adopted one Ramasami. The property then vested in Ramasami, and Parvathammal looked after it as his guardian, Ramasami, died in 1839 and the property devolved on Parvathammal as his heir and she enjoyed the same till her death in 1841. Then it is alleged one Sundaram Aiyar obtained possession of the property as guardian of Sellathammal and that such possession was adverse to the rights of the proper heirs of Ramasami, and that Sellathammal, when she came of age continued in adverse possession and thus acquired a right as absolute owner.

Sellathammal died in 1891, her husband Narayanasami having pre-deceased her in 1868. And the plaintiff says that he being a nephew of Narayanasami succeeded to the property on the death of Sellathammal, who had acquired an absolute right thereto by adverse possession, and he further alleges in the alternative that the property was owned and possessed by Narayanasami adversely to Sellathammal, and in this view of the case also

1. (1895) I. L. R. 20 B. 736.

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he is entitled to the property on the death of Narayanasami's widow Sellathammal. The plaint goes on to state that whatever right Srinivasa Aiyar, the defendant in the previous suit and father of defendants 1, 2 and 3 in the present case, possessed in the suit properties was extinguished by the adverse possession of Sellathammal and Narayanasami Aiyar. It further states that the Government took possession of the property probably as an escheat, but that eventually on certain misrepresentations being made by Srinivasa Aiyar, the predecessor-in-title of the defendants, the Government wrongfully put Srinivasa Aiyar in possession of the property in December 1891, which the plaintiff says is his cause of action. The main relief he asks for is declaration of his title to these properties and recovery of possession. It will be noticed that in the plaint in the previous suit allusion is made to the same order of the Government which is now alleged to be the cause of action. That order by which the plaintiff was dispossessed in December 1891 was passed before the institution of the previous suit. In the plaint in that suit he admits that the defendant had entered upon the land and was causing disturbance, but he claims that he was in possession by reason of the fact that he had granted leases to several persons before the passing of the order by the Government. It is not now alleged that anything has transpired since the institution of the previous suit in the nature of infraction of the plaintiff's right. What appears to have been the case, from the statements in the plaint in the previous suit, was that soon after the death of Sellathammal, there was the usual scramble for possession between the rival claimants and that the authorities supported the defendant's claim who on the strength of their order, entered upon the possession of the properties ; but the plaintiff claimed that he was still in possession. His possession, however, had to be secured and therefore he wanted a perpetual injunction against the defendant on the ground that he was entitled to the property on the death of Sellathammal. Whatever rights he has now to the property accrued on the death of Sellathammal by virtue of his relationship to her husband Narayanasami, and it is the same right which is in dispute in the present action. No doubt in the previous suit he alleged that the property belonged to Narayanasami and that he inherited it on the death of his widow who was in possession for 24

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years after Narayanasami's death, while in the present suit he says that either the property belonged to Narayanasami, he having acquired it by adverse possession, or to his widow Sellathammal by virtue of adverse possession against the heirs of Anappier, and that in either case he succeeded to the property on the death of Sellathammal.

As I read the plaint in the first suit, the cause of action then was the denial of the plaintiff's right to the property accruing on the death of Sellathammal and Srinivasa taking possession of the property on the strength of the order of the authorities, though he claimed that such order of the Government and the action taken under it should not affect his title nor the possession he had by virtue of the leases. The main question then was: Did the plaintiff acquire a right to the property on Sellathammal's death? And this is made clear by the issues framed in the case. It is true that the relief which he asked for then was perpetual injunction, but he could not have obtained that relief unless he was able to establish his title. As observed by their Lordships of the Privy Council, the cause of action has no relation to the character of the relief prayed for by the plaintiff, any more than to the defence which may be set up by the defendants—see *Chand Kour* v. *Partab Singh.*[1] It has been urged by the learned vakil for the plaintiff that it is not open to us in this connection to travel outside the four corners of the plaint in order to ascertain what the cause of action was in the previous suit, and he relies in support of this argument on the decision just referred to, where their Lordships observe that the cause of action refers entirely to the grounds set forth in the plaint as the cause of action, or in other words to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. But these observations must be read in connection with the context in which they are made. So read, they only mean that a cause of action is not governed by the nature of the defence which the defendant may set up. I do not think, for instance, that their Lordships intended to lay down that we are precluded, in determining whether the cause of action in the two suits is the same, from referring to the issues which were raised in the first action for the purpose of

1. (188?) I. L. R. 16 C. 98.

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finding out what the plaintiff had to prove and undertook to prove in order to support his claim as alleged in his plaint. The plaint in the suit of 1892 is extremely concise and vague, and it becomes necessary for the purpose of understanding the scope of that suit to refer to the issues. It has been argued with considerable emphasis that the plaintiff then alleged that he was in possesion of the property although it may be that his allegation was false or founded on misconception. But the plaintiff also alleged in the previous suit that he had a right to the property and that Srinivasa Aiyar in disturbing his possession purported to do so under some claim of right. The suit was not a merely declaratory suit, nor based on mere possessory title, instituted under the special provisions of the Specific Relief Act ; the entire scope of the suit was to obtain a decision that the plaintiff succeeded to the property on the death of Sellathammal. The plaintiff has in the present action merely varied the form of relief by asking for the recovery of possession instead of perpetual injunction, which means much the same thing in substance. If the causes of action in the two suits are substantially the same, the mere differences in the form in which they are stated or in the relief prayed for can make no difference in law--see *Haji Hasan Ibrahim* v. *Mancharam Kaliandas.*[1] Otherwise a plaintiff who has allowed judgment to go against him by default could always get over the disability imposed by S. 103 of the Code by simply manipulating the form of the plaint in a subsequent suit.

It is next argued that in the present suit the plaintiff's case is that the property belonged to Sellathammal or to her husband Narayanasami, while his case in the first suit was that it belonged to Narayanasami, and it was not alleged then that it belonged to Sellathammal in absolute right. In both the cases, whether the property belonged to Sellathammal absolutely or to Narayanasami, the plaintiff's title to it is based on his relationship to Narayanasami and arose on the death of Sellathammal. The media therefore, in the language of the Privy Council, on which the plaintiff in either case asks the Court to arrive at a conclusion in his favour, is succession to the property in question on the death of Sellathammal and the denial of such right by Srinivasa Aiyar, the defendant, or his representatives in title. I may

1. (1878) I. L. R. 3 B. 137.

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refer to a case in *Woomatara Debea* v. *Kristokaminee Dossee* [1] where the Judicial Committee of the Privy Council had to construe the phrase 'cause of action' as used in S. 2 of the Civil Procedure Code of 1859. The observations made in that case seem to bear closely on the facts of this case. There the plaintiff had in a former suit admitted that no portion of the land then sued for was included in the limits of a taluk as originally settled and defined by the dowl but that she had as taluqdar of that taluq acquired title to it as towfeer, *i.e.*, by gradual squatting or encroachment. It was held in the suit subsequently brought by her that she could not claim to fall back upon the title to the land as included within the limits of her taluq. Their Lordships observe: "The first question that occurs to their Lordships upon that section is what is meant by the cause of action. And in the present case they are clearly of opinion that the cause of action was the dispossession of the defendant by the fixing of the boundary that is now complained of and the other proceeding in the Act IV case. The result of these proceedings was to affirm the possession of the defendants in the land which was the subject of the first suit and to leave the party who felt aggrieved by them to her remedy by a civil suit." Then they go on to say: "Now it is perfectly clear to their Lordships upon the proceedings that the real question in issue to be determined between the parties then was whether the lands then sued for, which included the lands now sued for, belonged as of right to the taluqdar, or whether they fell within lot 32 which belonged to the defendants. And it was open to the plaintiff, the present appellant, in the former suit, to shape her title in either of three ways. She might have said, as she did say, according to Mr. Doyne's argument to-day that the whole of the land then claimed was towfeer land; or she might have said a portion of the land fell within the taluq, as originally settled and formed part of the 7,000 and odd beegas mentioned in the dowl and the residue of it is towfeer land; or she might have put her case in the alternative and have said that she had a good title to a portion as her original land, but that, should the proof of that fail, that portion also was to be considered as towfeer land. With the full knowledge of all the circumstances she chose to say: 'I admit that I am in

1. (1872) 18 W. R. 163.

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possession of all that I was entitled to under the dowl, but I claim this land, the whole of it, as towfeer land.' The contention now is that although she saw fit to take that course then, she has now a right to fall back upon the other title, and to say: 'The boundary was improperly drawn so as to include in the defendant's holding that which of right should have been within my originally settled taluq; and as I now claim in that way that which I might have claimed in the former suit, I am not precluded from bringing this second suit.' It appears to their Lordships that that contention cannot prevail against the clear terms of the section in question, or indeed, upon principle." S. 2 of Act VIII of 1859 on which the question arose was in these terms: The Civil Courts shall not take cognizance of any suit on a cause of action which shall have been heard and determined by a Court of competent jurisdiction between the same parties or the parties under whom they claim. That lays down a narrower principle of *res judicata* than S. 13 of the Code of 1882, while the disability imposed by S. 2 of Act VIII of 1859 seems to be the same as that laid down by S. 103 of the Code of 1882 which precludes a second suit being brought on the same cause of action as in the first suit, even though the first suit was dismissed for default of the plaintiff and not heard and determined. In the present case, therefore, the subject of inquiry is the same as was in the case in *Woomatara Debea* v. *Krishtokaminee Dossee*,[1] *viz.*, the identity of the cause of action. Thus, to adopt the language of the Privy Council, it can make no difference in principle how the present plaintiff shaped his title if he was in a position at the time of the suit of 1892 to base his claim on two alternative titles which he has put forward in the present suit. Though S. 13 is not applicable to this case as the previous suit was not heard and finally decided within the meaning of that section, I think S. 42 and S. 43 are clearly applicable. S. 42 lays down that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subject in dispute and so to prevent further litigation concerning them. The real subject of dispute in this case was the title of the plaintiff to the property in question which accrued on the death of Sellathammal, and the

1. (1872) 18 W.R. 163.

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plaintiff ought to have to put forward the two alternative sets of facts which are now alleged in support of that title and which existed at the time of the previous action. What led the plaintiff to come to Court then as now was the order of the Government on the strength of which Srinivasa Aiyar obtained possesion of the land and the denial of the plaintiff's title thereto by Srinivasa Aiyar. Section 43 lays down that the whole of the plaintiff's claim should be included and he must ask for all the remedies to which he may be entitled in respect of the same cause of action. One test, it seems to me, which may be usefully applied in order to see whether the causes of action are the same, is whether the Sections 44, 45, 46 and 47 of the Code which relate to joining causes of action would have any application to such a case as this. To my mind, it is obvious, that they would not. I may also refer to the case of *Munshee Buzloor Ruheem* v. *Shumsoonissa Begum* and *Jodonoth Bose* v. *Shumsoonissa Begum.*[1] There the question for consideration was whether the claim in the new suit was in fact founded upon a cause of action distinct from that which was the foundation of the former suit. The cause of action in the former suit of the respondent in the appeal before their Lordships of the Judicial Committee was a refusal by her husband, the appellant, to restore, or his misappropriation of, the wife's property which she says she entrusted to him. The property sought to be recovered in the second suit was a particular company's paper which along with other property, the subject of the first suit, was deposited with the husband. This company's paper not having been sued for in the first action it was held that the plaintiff could not recover it in the new suit. The cause of action in both the suits was one and the same conversion

None of the cases cited by the learned vakil for the appellant has, it seems to me, any bearing on this case. In *Pittapur Raja* v. *Suriya Rao,*[2] the claim involved in the second suit in respect of the personalty had not arisen at the time of the former suit. In *Ramaswami Ayyar* v. *Vythinatha Ayyar*[3] the two suits related to two distinct mortgages, and, as it is pointed out in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair*[4] and others, the cause of action in *Ramaswami*

1. (1867) 11. M. I. A. 551.
2. (1885) I. L. R. 8. M. 520
3. (1902) I. L. R. 26. M. 760.
4. (1905) I.L.R. 29 M. 153.

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Aiyar v. *Vythinatha Ayyar*[1] arose out of two distinct contracts. In *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty*[2] the previous suit, which was one for declaration of title to and confirmation of possession of certain land, had been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit and his title was not adjudicated upon. It was held that a subsequent suit for recovery of possession on the same title was not barred under S. 43 because the causes of action were different. As the learned Judges point out, the previous suit was one of a declaratory nature and the plaintiff could not then have asked for anything more on his allegations in the plaint, and after the previous suit there had been an active disturbance of the plaintiff's possession. But if the Court in that case had found against the plaintiff both on the question of title and of possession he could not have subsequently brought another suit on the basis of his title although his first suit was liable to be dismissed on the question as to possession alone being determined against him—see *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya*[3]." So if the cause of action in the present case was the denial of the plaintiff's title to the land by succession to Sellathammal and the disturbance of his possession by Srinivasa Aiyer, it would not be open to the plaintiff to say that if he had prosecuted the suit and it was found that he was not in possession, then on that ground alone his suit might have been—though I do not think it would have been—dismissed.

I am, therefore, of opinion that the judgment of the lower Court on this point is right and that the appeal must be dismissed with costs.

Munro J:—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Srinivasa Aiyangar and others .. Appellants*

(*Plaintiffs Nos. 1 to* 6 *and legal representative of the* 3*rd appellant, deceased*)

v.

Srinivasa Aiyengar and others .. Respondents

(*Defendants*).

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* A No. 85 of 1904. 7th February 1910.

1 (1902) I. L. R. M. 760. 2. (1882) I.L.R. 8 C. 819.

3. (1897) I.L.R. 24 C. 900.

C.P.C. (1882) *Ss.* 13, *Cl.*(5),30—"*Parties to suit*"—*Right claimed in common—Decree 'in personam,' how far binding on other members of the community—Thengalais and Vadagalais—Res judicata in execution of decree for injunction.*

Though, no doubt, judgments *in personam* bind only parties and privies, yet, the relation established between parties by such judgments is conclusive against third persons in the absence of fraud upon them. A judgment obtained against the *mirus* holders of the *Adhyayakam* office is binding on the trustee of the temple as well.

A previous adjudication between the Thengalais and Vadagalais of a place wherein the parties represented other members of the caste, under S. 30, C. P. C., of 1882, as to their respective rights of *Adhyapakam* in the local temple concludes not only the temple trustee in the absence of fraud, but also all the members of the communities for all time.

But an adjudication in execution of an injunction decree against the parties to the previous suit is not binding on the members of the community who were not directly parties to the decree granting the injunction.

Appeal from the decree of the Subordinate Judge's Court of . uticorin in O. S. No. 22 of 1903.

P. R. Sundara Aiyar and *K. R. Krishnaswami Aiyar* for appellant.

K. Kuppusawmi Aiyar, *M. A. Tirunarayanachariar* and *S. Alasingarachariar* for respondents.

The Court (*Subrahmanya Aiyar* and *Benson*, J.J.) delivered the following,

JUDGMENT :†—Judgment in this case wasreserved as we wished toconsider, in connection with an argument of Mr. P. R. Sundara Aiyar, to be noticed presently, the true effect, with reference to the present claim, of the adjudication in O. S. No. 2 of 1896 on the file of the Subordinate Judge's Court of Tinnevelly, where it was established that the right to the Adhyapakam office in the temple of Nachiar and Vatapatra Sayanar in Srivilliputhur as well as in all the shrines attached thereto was vested in the Thengalai and other Thirtakars, residents of that place, as found in the decree and judgment, and that the Vadagalais other than the Thirtakars possessed no interest whatsoever in the office. As was intimated by us in the course of the argument, there can be no doubt that in that litigation the then plaintiffs acted on behalf of all the Thengalais, while the then defendants respresented the Vadagalais of the place, having been duly constituted so to represent by the notification issued by the Court under S. 30 of the Code of Civil Procedure. As the present plaintiffs belong to the community of Vadagalais of Srivilliputhur, the previous adjudication cleary binds them as mere Vadagalais, if the Vedanta Desikar shrine be, as contended

† 15th, 16th, 20th, and 21st Nov. and 1o Dec. 1906.

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on behalf of the Thengalai defendants in the present suit, a shrine attached to the Nachiar and Vatapatra Sayanar temple.

No doubt, in the execution proceedings taken in that suit, it was held that the shrine in question was one so attached. The execution was, however, with reference to the enforcerment of the order restraining the then actual defendants from interfering with the discharge of the duties of the Adhyapakam office. The present plaintiffs, not having been impleaded in the previous suit as defendants actually, were not liable to be proceeded against in execution for any alleged disobedience of the injunction granted therein—*Sadagopa Chari* v. *Krishnama Chari* [1]. Consequently the finding in the execution proceedings as regards the question whether the Vedanta Desikar shrine was appurtenant to the main temple or an independent institution, is not *res judicata*, and that question would have to be tried in the present suit regarding the plaintiffs as mere members of the Vadagalai community and *a fortiori* if, as the plaintiffs allege, the right of management of the shrine belongs to them.

Before, however, passing orders as to the trial of the point, we proceed to deal with the argument of Mr. Sundara Aiyar referred to, *viz.*, that even on the assumption that the shrine in question is subordinate and attached to the big temple, the finding that the Adhyapakam miras belongs exclusively to the Thengalais, and the Vadagalai Thirtakars, is with reference to the plaintiffs' special capacity as *trustees* of the shrine, *res inter alios acta* and therefore it is open to them to prove that the rightful holders of the office are not the Thengalais but the Vadagalais, to restrain the former from interfering with the office and to ensure the observance of the usage of the institution by executing the duties of the office from the Vadagalais. Though the decision of the question thus raised is not altogether free from difficulty, we are of opinion that the contention ought not to prevail, as the office of Adhayapakam in the shrine belongs, according to the plaintiffs, exclusively to the Vadagalais of Srivilliputhur and is vested in them and their descendants hereditarily, and as between that community and the Thengalais of the place the adjudication in favour of the latter in the litigation of 1896 is as already stated, absolutely binding. The case, with reference

1. (1889) I. L. R. 12M. 356.

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to these special facts, must be held to be governed by the rule stated in BIGELOW on *Estoppel* as an exception to the general doctrine that judgments *in personam* bind only parties and privies, according to which exception the *relation* established between parties by such judgments is conclusive against third persons in the absence of fraud upon them. (5th Edition, p. 150). A clear instance of this exception is furnished by *Candee* v. *Lord* [1], followed in other cases, where it was held by the Supreme Court of New York that a judgment is conclusive evidence in a creditor's suit founded on it, as against the other creditors of the debtor, that the plaintiff is a creditor and to the amount awarded him by the judgment, unless it is impeached for fraud or collusion. In the absence of any precedents, Indian or English, elucidating this point, the reasoning of *Gardiner* J. who delivered the judgment may usefully be set forth. He observed :—" A debtor may be said to sustain " two distinct relations to his property, that of owner and *quasi* "trustee for his creditors. As owner he may contract debts to be "satisfied out of his property, confess judgments, create liens " upon it, sell or give it to others at pleasure and, so far as he is "personally concerned, will be bound by his own acts. But the "law lays upon him an obligation to pay his debts and holds " him, in behalf of his creditors, to the exercise of good faith in " all transactions relating to the fund upon which they must "depend for payment. He can, therefore, neither create a debt " nor do any of the things above mentioned *mala fide* to their " prejudice. The common law, of which the English Statute "and our own is but the exposition, declares that every such " debt, judgment or assurance contracted or given with the " intent to hinder, delay or defraud his creditors is as against " them to be void. And equity in many cases holds the debtor "and his confederates in the fraud as trustees for the parties " aggrieved. The rights of creditors to the property of the " debtor are to be worked out through the different relations to " which I have alluded. In creating debts or establishing the " relation of creditor and debtor, the debtor is accountable to "no one unless he acts *mala fide*. A judgment therefore " obtained against the latter without collusion is conclusive

1. 51 Am. Dec. 294 ; 2 N.Y. 269.

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"evidence of the relation of debtor and creditor against others: "(1) because it is conclusive between the parties to the record "who in the given case have the exclusive right to establish "it; and (2) because the claims of other creditors upon the "debtor's property are through him and subject to all previous "liens, preferences or conveyances made by him in good faith. "Any deed, judgment or assurance of the debtor, so far at least "as they conclude him, must estop his creditors and all others. "Consequently neither a creditor nor stranger can interfere in "the *bona fide* litigation of the debtor or retry his cause for him "or question the effect of the judgment as a legal claim upon "his estate. A creditor's right, in a word, does not arise until the "latter has violated the tacit condition annexed to the debt, "that he has done and will do nothing to defraud his creditors.

"Where, however, fraud is established, the creditor does "not claim through the debtor but adversely to him and by a title "paramount which over-reaches and annuls the fraudulent "conveyance or judgment by which the latter himself would be "estopped. It follows, from the principles suggested, that a "judgment obtained without fraud or collusion and which "concludes the debtor, whether rendered upon default, confes-"sion, or after contestation is, upon all questions affecting the "title to his property, conclusive evidence against creditors to "establish first the relation of creditor and debtor between the "parties to the record; and, second, the amount of the indebted-"ness" (51 Am. Dec. at pp. 295, 296.)

The Full Bench ruling in *Periasami Mudaliar* v. *Seetharama Chettiar*[1] that, independently of the original transaction, the decree against a father creates by its own force a debt against him which his sons according to Hindu Law are bound to pay, unless it is illegal or immoral, would seem to rest on the principle enunciated in the passage quoted above.

Turning to the present case, it is clear that the right of the trustee to require compliance with the usage of the institution in regard to the Adhayapakam office, which office, by virtue of its hereditary character stands, according to the law of this country, on a par with interests in immoveable property, is necessarily linked with, dependent upon and subordinate to the

1. (1903) I.L.R. 27 M. 243.

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right of the exclusive mirasi holders of the office—dependent and subordinate because it is by them and by them only that he can get the functions of the office performed. It follows that an adjudication obtained against them would be as binding on him as it is on them in the absence of fraud or collusion. A different view would be to uphold a contrariety of conclusions leading to a deadlock, that is to say, on the one hand the Thengalais are entitled to exclude every Vadagalai interfering with their exercising the functions of the office in the shrine by virtue of the former decision, and yet, on the other hand, the trustee thereof is entitled to insist on the Vadagalais performing them. It would, therefore, seem to be the better opinion that the trustee is also concluded by the judgment which declared that the body of people put forward by him as entitled to the office were not so entitled. It is scarcely necessary to say that there was nothing to prevent the present plaintiffs in their alleged character of trustees making themselves parties to the former suit and resisting the claim of the Thengalais as best they could and if possible preventing an adjudication in their favour. The omission to do so could not properly be held to give them the right to get rid of the effect of a decision against those very parties *in whose right* in truth the plaintiffs are now endeavouring to deny the title of the successful party. As the previous adjudication has not been impeached on the ground of fraud, the contention under consideration must be held to fail and it will not be open to the plaintiffs to question the title of the Thengalais to the office of Adhyapakam in the Vedanta Desikar shrine, if that is found to be an adjunct of the main temple.

The Subordinate judge is called upon to submit within three months from this date findings on the following points :—

(1) Whether the plaintiffs are the hereditary trustees entitled to the management of the Vedanta Desikar shrine:

(2) Whether the said shrine is, or is not, one of the shrines attached to the Nachiyar and Vatapatra Sayanar temple : and

(3) Whether the plaintiffs are disentitled to a declaration of their alleged right as trusees with reference to the proviso to S. 42 of the Specific Relief Act.

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We direct that the trustees of Nachiyar and Vatapatra Sayanar temple be made defendants in the case. The trial of the issues should take place after these newly added defendants have had notice of their inclusion as parties and after they have had time to appear and file written statements. If necessary, further issues may be framed on their written statements.

Fresh evidence may be received.

Seven days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge, Tinnevelly, submitted the following

FINDINGS :—* * * That the Vadanta Desikar shrine is an independent institution and is not under the control of the Vishnu Committee and of the Nachiar Devasthanam trustees and is not attached to that Devasthanam He also found the 1st issue in plaintiff's favour

As regards the 3rd issne he found that the plaintiffs were in full possession of all their rights in respect of this Desikar shrine and this issue therefore he found in their favour.

This appeal coming on for hearing, after the return of the above finding, * the Court delivered the following

JUDGMENT :—The Subordinate Judge has dealt very fully with the evidence on the issues sent down to him and we accept his findings.

The plaintiffs have shown that from the early years of the 19th century their predecessors and themselves have managed the affairs of the Vedanta Desikar temple, and there is on the other side nothing to show that the trustees of the Nachiar temple have ever interfered with them.

The strongest evidence in support of the defendants' case is the payment of paditaram from the Nachiar temple funds but that, as the Subordinate Judge shows, is not by any means conclusive. Exhibit *XI-A* shows that paditaram is paid by the Nachiar temple trustees to persons and institutions who are not shown to be in any way under their control. Apart from this evidence there is really nothing else to rebut the evidence on the side of the plaintiffs. The Subordinate judge shows that the admissions on which the defendants rely do not amount to admissions that the temple is under the control of the Nachiar

* 16th, 17th and 18th March 1909.

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Kovil trustees and the circumstances in which those admissions were made indicate that they cannot be taken as conclusive. The fact that till recently the plaintiffs have not styled themselves Dharmakartas but only Archakas is of no value when the two offices, as occurs not infrequently in the case of small temples, are united in the same person or persons.

The temple in question, though close to the gate of the Nachiar temple, is not within its walls, and the presumption to be drawn from its position is not strong. Against this evidence the plaintiffs bring evidence that before the formation of the Temple Committee under the Act of 1863 the Government treated their temple as a separate institution and that since that date they have rendered no accounts to the trustees of the neighbouring temple and have not acted in obedience to them or deferred to their authority.

In this state of the evidence we must accept the findings and reverse the decree of the Subordinate Judge.

In our decree, therefore, we shall have to declare that the Vedanta Desikar temple and the property in the plaint schedule are not attached to the Nachiar and Vatapatra Sayanar temple within the meaning of the decree in Original Suit No. 2 of 1896 on the file of the Temporary Subordinate Judge's Court, Tinnevelly, and the rights of the plaintiffs in respect of the Vedanta Desikar temple are not affected by that decree or the execution proceedings taken thereunder, and that the plaintiffs are Dharmakartas of the Vedanta Desikar temple and entitled to manage it and its property uncontrolled by the trustees of the Nachiar and Vatapatra Sayanar temple. And we shall have to add an injunction restraining the trustees of Nachiar and Vatapatra Sayanar temple from interference with the plaintiffs in their management of the temple.

But in order to decide all the questions in the suit it will be necessary to ask the Subordinate Judge to record a finding on the issue whether the plaintiffs are holders of the Adhyapakam office in the temple of Vedanta Desikar to the exclusion of the defendants or whether the defendants are also entitled thereto, and if the defendants are found to be entitled to the Adhyapakam office, then a finding should be recorded on the 7th and 8th issues in the suit. Fresh evidence may be taken.

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The finding should be submitted in six weeks, and seven days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge of Tinnevelly submitted the following

FINDING:—* * * I find the former part of the issue in the affirmative and the latter part in the negative.

In view of the above finding, the remaining two issues need not be tried according to the order of remand of the High Court. But the evidence given by plaintiffs covers these two issues also and on it I shall find the 7th issue in the suit referred to above in the affirmative. On the 8th issue burden lies on defendants to prove the point but they have not adduced any evidence in support of it. On the contrary plaintiffs' witnesses swear that Adhyapakam is performed in the Vedanta Desikar temple in all the days in the year but not on the Adhyana festival days and on the annual Thirunakshatram day only as contended by defendants. My finding on the 8th issue is in the negative.

This Appeal coming on for final hearing after the return of the above finding, the Court delivered the following

JUDGMENT:—We cannot give any weight to the affidavit in support of an application for adjournment made before the Subordinate Judge and we accept the Subordinate Judge's findings on the evidence.

In the result, the plaintiffs will have the declaration for which we have already provided as to their right to manage the temple and, in regard to the matter now in question, a declaration that the plaintiffs are the holders of the Adhyapakam office in the Vedanta Desikar temple to the exclusion of the defendants and a further declaration, as set out in the 7th issue, that they and the Vadagalai Vaishnavite Brahmans are entitled to perform the recitations there set out on the occasions mentioned there and in prayer II of the plaint. They will also have an injunction as before provided in regard to the management of the temple, and an injunction prohibiting the defendants from interference with the plaintiffs in the performance of the duties of the Adhyapakam office and with them the Vadagalai Vaishnava Brahmans on the occasions in respect of which the declaration has been given under the 7th issue. The plaintiffs' costs throughout will be paid by the contesting defendants.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

M. Chengiah .. Appellant*
(2nd Defendant)

v.

Umadai Rajah Raja Damara Kumara Thimma Nayanim Bahadur, present holder of the Kalahasti Zemindari, and others .. Respondents.
(*Plaintiff's legal representatives and 1st Deft.*)

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Landlord and tenant—Surrender—Partnership in respect of leasehold interest—Endorsement by landlord—Registration, necessity for—Forfeiture—Tenant's acquiescence—Limitation Act, Arts. 110, 112, 115—*Suits for rent—Liability of assignee to suits for rent.*

Per *Abdur Rahim* J. (*Munro* J. *contra*) :—The acceptance by a landlord of rent from a person who acquired an interest in the lease under an agreement with the tenant, though with the landlord's assent, does not by itself operate as a surrender of the lease.

Per *Abdur Rahim* J.—The onus is on the person who objects to a deed for want of registration to shew that the writing is required by law to be registered. A contract of partnership in respect of a lease-hold interest does not require registration, and a person who enters into a contract of partnership with a tenant and enters into possession and enjoyment of the leased property is liable to the landlord for the rent.

An endorsement by the landlord evidencing his assent to the assignment by the lessee of an interest does not create an interest in immoveable property and requires no registration. Though it is not necessary that the tenant should assent to the act of forfeiture by the landlord, yet the question of the tenant's acquiescence or otherwise has a bearing on the landlord's right of forfeiture, and the landlord can waive his act of forfeiture if the tenant has not assented to it.

Art. 110 of the Limitation Act is applicable to suits for rent generally, but Art. 116 specially provides for a suit based on a contract in writing including a lease : and the period of limitation is the same in respect of an assignee from the registered lessee, the covenant for rent being one which runs with the land.

Obiter :—The liability for rent of an assignee of a term arises out of privity of estate existing between him and the lessee, and his liability ceases on the termination of such privity as by relinquishment of possession or transfer.

Any agreement between the lessee and his assignee who enters into partnership with the lessee in respect of the lease, as regards the share of each in the profits and losses, cannot bind the landlord and would not affect his rights upon the covenants in the lease.

Per *Munro* J :—S. 112 of the Transfer of Property Act regarding waiver of forfeiture has no application to a case where the landlord has already taken advantage of the forfeiture and determined the lease.

Held also :—That the landlord was entitled in the case to recover as for use and occupation and that Art. 115 of the Limitation Act applied to the case.

Appeal from the decree of the District Court of North Arcot, dated the 31st day of December 1904 in O. S. No. 18 of 1903.

S. Srinivasa Aiyangar, P. Subrahmaniem and *T. Narasimhachariar* for appellant.

Hon'ble Mr. *L. A. Govindaraghava Aiyar* and *V. C. Sheshachariar* for respondent.

* A No. 233 of 1905. 8th March 1910.

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Munro J.

The Court delivered the following

JUDGMENTS:—*Munro* J:—The first question with which I propose to deal is whether, as contended by the appellant (2nd defendant) and by the 1st defendant in his Memorandum of Objections, the leases of 1894 evidenced by Exhibits *A* and *B* were determined in 1897. Exhibit *XXIX* of the 26th Sept. 1897 shows that the 1st defendant in whose favor Exhibits *A* and *B* were executed had fallen into arrears, and that the Tahsildar proposed to the Dewan that the leases should be cancelled for breach of the condition to pay the rent according to the kists. This was followed by Exhibit *X*, which is dated the 24th October 1897. This is from the Tahsildar to the 1st defendant, and informs the latter that, as he had fallen into arrears and was raising unnecessary disputes, a hukum had been issued on the 22nd October 1897—this was a hukum issued by the Dewan as appears from Exhibit *XI*—cancelling his Izara in accordance with the last term in Exhibits *A* and *B*, and directing the villages comprised in the leases to be taken under estate management, and that takids have been written to the people of the villages informing them of these matters. The 1st defendant was, therefore, given to understand that he should not thereafter collect money or do anything else in the village. The 1st defendant then appears to have asked the Dewan to reconsider the matter and the result appears in Exhibit *XI*, dated the 12th December 1897. This document, which is from the Tahsildar to the 1st defendant, refers to the cancellation of the Izara by the hukum of the 22nd October, and then goes on to say that as the 1st defendant had agreed to a certain arrangement the Dewan had issued a fresh hukum, on the 10th December 1897, stating that "the Izara that had to continue according to the previous Izarakhat had again been sanctioned," and that takids had been written to the villagers accordingly. The only other document which need be referred to is Exhibit *H*, a petition sent by the 1st defendant to the Tahsildar, in which the 1st defendant says "the Dewan * * * restored our Izara villages to us whose Izara had been cancelled." Coming to the oral evidence we find the 1st defendant stating that the leases were cancelled in fasli 1307, that the cancellation was proclaimed

in the villages by beat of tom-tom, and that the villages were under estate management for two months after the cancellation. He is supported by Defence Witness No. 4 who is Monegar of one of the villages; by Defence Witness No. 5, a chief ryot of the same village; by Defence Witness No. 6, Monegar of another of the villages who says that he received a takid to the effect that the Izara was cancelled and that he published by beat of tom-tom that kist should not be paid to the Izaradar; by Defence Witness No. 7, chief ryot of one of the villages; and by Defence Witness No. 8, Curnam of all the villages. The District Judge has dismissed all this oral evidence with the remark that it is interested. What the witnesses speak to is, however, highly probable, for it is only what would in ordinary course have happened. Exhibit *X* states that takids had been written to the people of the villages regarding the cancellation, and tom-toming is a usual way in this country of making such a matter generally known. Further the evidence is entirely uncontradicted and this although the plaintiff's witnesses were examined later. An attempt was also made to show that some rent was collected on behalf of the Rajah during the period between Exhibits *X* and *XI*. The evidence regarding this is not very satisfactory. But the collection of rent on behalf of the Rajah during that period is not essential for the purpose of showing that the leases were determined, and it has not been suggested that anything was collected by the 1st defendant or by the 2nd defendant's father. On the evidence I have no hesitation in holding that the leases were determined. Under S. 111 (*g*) of the Transfer of Property Act, a lease of immoveable property determines by forfeiture if there is a breach of a condition which entitles the lessor to re-enter and if the lessor does some act showing his intention to determine the lease, and both these conditions are amply fulfilled in the present case. It is pointed out in *The Zemindar of Vijianagaram* v. *Behara Suryanarayana Patrulu* [1] that "according to the common law of the land which specially prevails in Zemindaries and similar estates, the delivery of possession, when the owner transfers the estate or a portion thereof, by sale, gift, lease or otherwise, is by the issue of the orders or notices to the kurnams and other village

1. (1901) I. L. R. 25 M. 587 at p. 592.

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officers whose duty it is to collect rents from the persons in occupation of the land, and also, though not invariably, by a general proclamation addressed to the ryots and other persons in occupation of the land, giving intimation of the transfer in question and requiring them to attorn and pay rent to the transferee." The same would apply *mutatis mutandis* to the case of a lessor taking possession after cancellation of a lease like those in suit and there can therefore, in my opinion, be no doubt as to the intention of the lessor in this case. The District Judge is of opinion that "if there was cancellation and forfeiture there was also a waiver of forfeiture as evidenced by Exhibit *XI* and the subsequent enjoyment by the lessees and payment of rent." Section 112 of the Transfer of Property Act deals with the question of waiver of forfeiture. It states that a forfeiture under S. 111 (*g*) is waived by any act on the part of the lessor showing an intention to treat the lease as subsisting, provided that the lessor is aware that the forfeiture has been incurred. That is to say, if the lessor is aware that an event has occurred which entitles him to determine the lease, he may show by his acts that he does not intend to take advantage of it. But if he has already taken advantage of it, and determined the lease, S.112 can, in my opinion, have no application. The leases under Exhibits *A* and *B* having been cancelled the suit as based on Exhibits *A* and *B* must fail. It is contended, however, for the plaintiffs, relying on *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh*,[1] that he is entitled at any rate, to recover compensation for use and occupation as the defendants were again let into possession under the circumstances already set out, and that the rent fixed in the lease is a fair basis for the amount to be decreed. To this it is replied that no such relief was asked for in the plaint, and that therefore it cannot be granted. *Rachhea Singh* v. *Upendra Chandra Singh*[2] is relied upon. That case follows *Surendra Narain Singh* v. *Bhai Lal Thakur*[3] and *Lukhee Kanto Dass Chowdhry* v. *Sumeerudi Lusker*,[4] and in all these cases the facts were very different from the facts in the present case. It was observed in *Surendra Narain Singh* v. *Bhai Lal Thakur*[3] that the suit, if tried as one for use and

1. (1909) I. L. R. 31 A. 276.
2. (1899) I. L. R. 27 C. 239.
3. (1895) I. L. R. 22 C. 752.
4. (1874) 13 B. L. R. 243.

occupation, would raise issues of an entirely different character, and would necessitate a new trial of the case upon fresh evidence. The same remark is applicable in the case of *Lukhee Kanto Das Chowdry* v. *Sumeerudi Lusker* [1] and *Rachhea Singh* v. *Upendra Chandra Singh* [2]. The facts in the present case raise no such obstacle. I would therefore follow *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* [3] and find that the plaintiff is entitled to compensation for use and occupation. The further question arises as to the period for which such compensation can be granted. The limitation is three years under Article 115 of Schedule II of the Limitation Act, and this being so the claim for use and occupation is barred save in respect of faslis 1310 and 1311 which are the last two faslis for which claim is laid. The amount to be paid for use and occupation for faslis 1310 and 1311 has now to be determined. Under Exhibits *A* and *B* a money rent is fixed. In addition to this a road cess is to be paid and a certain quantity of straw delivered. The road cess claimed is calculated at the usual rate on the lease amount, and this, in my opinion, is correct. There are no claims for remission in faslis 1310 and 1311. The lease amount plus road cess and the value of the straw may therefore be taken as the reasonable amount payable for each fasli for use and occupation. I do not think the plaintiff should be allowed interest prior to suit. The total demand shown in the schedule of account annexed to the plaint for faslis 1310 and 1311 may therefore be accepted as the amount for which the defendants are liable for those faslis. That schedule, however, shows that collections were made from the defendants for those faslies, and the defendants are therefore now liable for only the balance shown. These amount to Rs. 665-2-3, and for this amount I would give the plaintiff a decree with interest at 6 per cent per annum from date of suit till payment. For the decree amount the defendants are jointly and severally liable as it is abundantly proved that each of them was interested in the occupation of every portion of the suit property. There will be proportionate costs throughout.

Abdur Rahim J. :—The suit in which this appeal arises was instituted on the 29th June 1903 by the Zemindar of Kala-

1 (1874) 13 B. L. R. 243. 2. (1899) I. L. R. 27. C. 239.
3. (1909) I. L. R 31 A. 276.

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hasti for recovery of Rs. 8,059-8-7 as rent due under two Izara leases with respect to three villages, Adaram, Brahmanapalli and Kandalur, for faslis 1305 to 1311. The lease of Adaram and Brahmanapalli was granted on the 15th February 1894 and of the village of Kandalur on the 9th March 1894, both for a term of 9 years, to the 1st defendant under registered cowle deed ; the 1st defendant executed corresponding muchilikas in the Zemindar's favour. The 2nd defendant was impleaded on the 7th October 1903 as representative of his father who in February 1898, by an arrangement entered into between him and the 1st defendant and sanctioned by the plaintiff, was let into possession of the three villages. The suit was contested by the defendants on various grounds but the District Judge, having regard to his findings on the different issues raised at the trial, has given a decree to the plaintiff for a sum of Rs. 5,305-12-3 to be recovered from the 1st defendant and for Rs. 4,242-15-11 out of the above sum to be recovered from the 2nd defendant, thus holding both the defendants to be jointly and severally liable in respect of the latter sum. The decree also provides for the usual interest to be paid on the amount decreed and directs each party to pay costs to the other in proportion to the claim allowed or disallowed.

This appeal has been preferred by the 2nd defendant, and the 1st defendant has also filed a Memorandum of Objections. Some of the objections taken to the judgment of the District Judge are common to both the defendants.

One of the questions discussed before us is the effect of the arrangementby which the 2nd defendant's father entered into possession of the three villages. The fact that he had such possession since 7th February 1895 has not been contested before us by the learned vakil for the appellant. What is contended for is that there has been surrender of a moiety of the 1st defendant's interest in the leases by operation of law by reason of what happened between the parties, and thus the leases were determined so far at least as one moiety of the villages is concerned. What then was the nature of the transaction by which the 2nd defendant was let into possession? The most reliable evidence on this point is furnished by Exhibits *C*, *I* and *XXXV* and the conduct of the parties. These documents show that the 2nd defendant's

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father had arranged with the 1st defendant that the former should have a half share in the Izara leases, and this arrangement was submitted to the Zemindar for sanction which apparently became necessary as the leases contained a clause prohibiting assignment. The arrangement was approved by the Zemindar apparently because the 1st defendant, as stated in Exhibit *C*, was unable to bear the whole burden of the rent, and takids were accordingly issued to the Zemindary officials informing them that the 2nd defendant's father had been recognised as having a half share in the Izara leases granted to the 1st defendant. But there is nothing to show that it was ever intended to divide the tenancy into two halves, and I do not attach any weight to the evidence of the 1st defendant where he seeks to make out such a case. Neither the leases nor possession of the villages was delivered by the 1st defendant to the landlord, and no new lease was taken. The 1st defendant himself, and not the Zemindar let the 2nd defendant's father into possession, and the Zemindar never granted any lease to the 2nd defendant. The Zemindar was no party to any change of possession with respect to the demised premises and he throughout treated the 1st defendant as liable for the entire rent and the 1st defendant himself never disputed such liability. Demands for rent were issued to the 1st defendant alone and not to the 2nd defendant. It is true that some instalments of rent were remitted to the Zemindar's office by the 2nd defendant, but such payment, it is contended by the respondent, is attributable to the arrangement by which the 2nd defendant became an assignee of the leasehold interest and is in no way incompatible with the liability of the 1st defendant under the demise. On these facts, therefore, the proposition which must be established in order to make out a case of implied surrender or surrender by act and operation of law, in the language of English cases, is that, if a landlord accepts any payment of rent from a person who acquired an interest in the lease under an agreement with the tenant who let him into possession with the assent of the landlord, this by itself operates as surrender of the lease. I do not think that the cases cited by Mr. S. Srinivasa Iyengar bear out any such proposition. The doctrine of surrender by act and operation of law as established by *Thomas* v. *Cook*[1]

1. (1818) 2 B. and Ald. 119; 20 R. R. 374.

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and recognised in other cases is, as stated in *Davison* v. *Gent*,[1] that where a lessee assents to a lease being granted to another and gives up his own possession to the new lessee, that is a surrender of his term by act and operation of law. In *Hamerton* v. *Stead*,[2] the landlord, defendant in the action which was one for trespass, had demised the premises in question to the plaintiff as tenant from year to year and thereafter agreed to let the same premises to the plaintiff and one Moore jointly, and the latter entered and occupied jointly with the plaintiff under the agreement; held that the suit could not be maintained as that was a new contract determining the sole tenancy of the plaintiff and creating a new joint tenancy by the plaintiff and Moore. In *Laurance* v. *Faux*,[3] Laurance, having entered into agreement with the defendant Robert Faux to let certain premises to him, afterwards agreed, and with the consent of Robert Faux, to let a portion of the same premises to Edward Faux and accepted rent from the latter; *Blackburn* J. held that in these circumstances the receipts for rents received from Edward Faux were strong evidence of a change of tenancy with the consent of the landlord amounting to a surrender by operation of law. The law on this subject was again recently considered by *Chitty* J. in *Wallis* v. *Hands*[4]. There a new lease in possession was granted to a third person with the oral assent merely of a person in possession under a prior subsisting lease, but the old tenant did not give up possession to the new tenant at the time of the grant of the new lease; it was held that there was no surrender by operation of law so as to take the case out of the Statute of Frauds. It will be seen then that in all the cases relied on by the learned vakil for the appellant there was either a lease granted by the landlord to the new tenant or a valid agreement to grant such lease, so that there was an acceptance on the part of the landlord of a change in the tenancy. But in the present case it was not within the contemplation of the parties that the 2nd defendant should become a tenant of the plaintiff in place of the 1st defendant. Further, so far as the 2nd defendant is concerned it is difficult to

1. (1857) 26 L. J. Ex. 122.
2. (1824) 3 B. and C. 478.
3. (1861) 2 F. and F. 435.
4. (1893) 2 Ch. p. 75.

appreciate his position with reference to the question of implied surrender. If there was an implied surrender at all, it must be by the substitution of a new tenancy for the old. But the 2nd defendant's case is that no relation of tenant and landlord has been created between him and the plaintiff. It may also be pointed out that neither the issues nor the Memorandum of Appeal or Objections raised any question of implied surrender and apparently no such plea was urged before the District Judge. In my opinion, however, upon the facts which have been proved, there was no surrender either express or implied. Even if there was a surrender, the defendants undoubtedly remained in possession afterwards and S. 116 would, in my opinion, be a sufficient answer to an attempt on their part to escape liability for rent under the covenants in the leases. In the circumstances of this case I attach no importance to the beating of tom-tom in the village, and I do not think that by what happened on the occasion there was an eviction of the defendants. In this view of the transaction it is not necessary to consider the question raised by the respondent whether there can be surrender, by operation of law, of an undivided share of a leasehold term.

The next point for consideration is whether the 2nd defendant is liable as assignee of a moiety of the 1st defendant's leasehold interest in the absence of a registered deed of assignment. Section 9 of the Transfer of Property Act clearly lays down that a transfer of property may be made without writing in every case in which a writing is not expressly required by the law. The onus is, therefore, upon the appellant to make out in the first place that the transaction by which the 2nd defendant acquired an interest in the leases is required by the law to be in writing, The view which I am inclined to take of the arrangement between the two defendants is, as disclosed in the evidence, that they intended to enter into a contract of partnership with respect to the Izara leases, each party taking half of the profits and sharing half of the burden. We find that the 1st defendant and the 2nd defendant's father are actually spoken of as partners; for instance, in Exhibit *D*, which is a power of attorney executed by the 2nd defendant's father, it is recited "as regards the rental of three villages Brahmanapalli, Adaram and Kondalur *jointly had with our partner* Chintalapalli Venkata Narasiah (*i. e.*, the 1st

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defendant) &c." Such a contract is not one of those transactions which must be embodied in a registered instrument, and as the 2nd defendant entered into possession and enjoyment of the villages as partner of the 1st defendant he would certainly be liable for rent to the plaintiff.

Then it is contended that Exhibits *C* and *I* not being registered should not have been accepted in evidence. But the agreement between the 1st and the 2nd defendants was independent of these documents. They only recite the arrangement which had already been arrived at.

It is also argued on behalf of the appellant that the endorsement on Exhibit *C* and Exhibit *I* by which the landlord waived his objection to the assignment is required, by S. 17 of the Registration Act, to be registered. But I fail to see how such an endorsement can be said to create, declare, assign, limit or extinguish any interest in, or right to, immovable property. The prohibition against transfer of the Izara was intended for the benefit of the lessor, and all that the latter purported to do was to give his assent to the transfer when made by the 1st defendant.

Such an act can hardly be said to be creation of an interest in immoveable property within the meaning of the section. The cases which lay down that a transaction purporting to be a sale of immoveable property and evidenced by a registered deed as required by the law cannot be proved to have been intended to operate only as a mortgage by adducing evidence contained in unregistered writings (see *Achutaramaraju* v. *Subbaraju* [1] and *Mutha Venkatachalapati* v. *Pyanda Venkatachalapati* [2]) or that an unregistered document cannot be admitted in evidence to affect mortgaged property by fettering the equity of redemption, have no bearing, in my opinion, on the present question.

The next question is whether there was a determination of the leases by forfeiture in October 1897. What happened then was: the rent fell into arrears and, according to the power reserved in the leases, the lessor sent a notice to the 1st defendant (Exhibit *X*) stating that he cancelled the Izara and that the villages would henceforth be managed under Amani. And

1. (1901) I.L.R. 25 M. 7. 2. (1903) I L.R. 27 M. 348.

it also appears from the evidence that this fact was proclaimed in the villages by beat of tom-tom and takids were issued to the Zemindary officials informing them of the cancellation of the leases.

An attempt was further made to prove that a sum of Rs. 30 was collected from the ryots by the Zemindar himself after the issue of Exhibit *X*, but I do not think that this has been satisfactorily proved. The man who actually collected the amount has not been examined, and it has not been shewn that the sum was remitted to the Zemindar's office. On the other hand although the Zemindar determined to put an end to the lease the 1st defendant never acquiesced in the act of the Zemindar, but prayed for 'continuance of the Izara according to mamool.' And the Zemindar acceded to this prayer and issued a fresh order on the 12th December 1897 to the effect that 'the Izara would continue.' The lessees continued in possesion of the villages and, as thea istrict Judge holds, there is no reliable evidence to show that between the 24th October and the 12th December, an interval of a month and a half, the defendants' connection with the villages ceased for any practical purpose or that the plaintiff assumed direct management of them. Upon these facts I have no hesitation in accepting his conclusion that the lease was never determined. There was no cessation of the relation of landlord and tenant between the parties though there might have been a temporary suspension of such relations. The leases were never delivered to the landlord and there was no actual change of possession. I am further unable to accede to the view that the landlord having once declared his intention to exercise the right of forfeiture and communicated that intention to the lessee and to his own servants and the ryots, he could not, if he so chose, waive the forfeiture, in response to the protests or representations of the lessee. I do not find anything in Sections 111 and 112 of the Transfer of Property Act which oblige me to adopt such a narrow construction of the law. It is, no doubt, not a necessary condition of the validity of an act of forfeiture that it should have the consent of the tenant, but at the same time, since forfeiture necessarily alters the position of the tenant, the question whether the tenant has or has not acquiesced in it must affect the landlord's right to waive forfeiture. If the landlord has elected to take advantage of the condition relating

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Abdur Rahim J.

to forfeiture and communicated his intention to the tenant and the tenant acquiesces in it, it stands to reason that the landlord cannot afterwards treat the tenancy as still subsisting. To this effect is the decision in the case of *Sergeant* v. *Nash Field & Co.*[1] and in other smilar cases cited by the appellant's pleader. But on the other hand, if the tenant never acquiesced in the landlord's act, and the landlord afterwards changes his mind at the request of the tenant himself, I do not see why he should not be able to waive the forfeiture so long as the question is one exclusively between him and the tenant. I would hold, therefore, that there was no determination of the leases by forfeiture.

I now come to the question of limitation. It is urged that the proper Article applicable to this suit is Article 110 which provides 3 years for a suit for arrears of rent, and not Article 116 which allows 6 years for a suit for compensation for the breach of a contract in writing registered. Article 110, it is argued, is specifically applicable to a suit like this, and therefore recourse cannot be had to a general Article like Article 116. A recent decision of the Allahabad High Court (*Ram Narain* v. *Kamta Singh*[2]) no doubt supports this view. But this Court has held a different view in *Vythilinga Pillai* v. *Thetchanamurthi Pillai*[3] and this is the view also of the Calcutta High Court (see *Umesh Chunder Mundul* v. *Adarmoni Das*,[4]) and I am not persuaded that it is wrong. Article 110 is applicable to suits for rent generally, but Article 116 specially provides for a suit which is based on a contract in writing registered, including a lease.

On behalf of the 2nd defendant it is further contended that, he being liable by reason of privity of estate and there being no privity of contract between him and the plaintiff, Article 116 has no application at least in his case. No doubt the liability of an assignee of a term for rent arises out of privity of estate existing between him and the lessee, so that his liability ceases on the termination of such privity, as by relinquishment of possession or transfer. But the assignee's liability is based all the same on the covenant for rent which in law runs with the land. There is, therefore, no ground for saying that the period of limitation would be different, so far as the claim against the 2nd defendant is concerned.

1. (1903) 2 K.B. 304.
2. (1903) I.L.R. 26 A. 138.
3. (1888) I.L.R. 4 M. 77.
4. (1887) I.L.R. 15 C. 221.

Srinivasa Aiyangar v. Srinivasa Aiyangar.

It has been also argued that each of the defendants would be liable for half the rent and not jointly and severally liable for the entire rent. But if the 2nd defendant entered into possession under a contract of partnership, whatever the nature of the arrangement between him and his partner as regards the share of each in the profits and losses, it cannot bind the landlord and would not affect his (the latter's) rights upon the covenants.

As regards the contention in connection with the liability for road cess and the claim for straw, I agree with what the learned District Judge says on those points, and as to the claim for remission for shavi, though I think, as contended for by the appellant, each year must be considered on its merits, I am unable to find on the evidence that the claim has been substantiated. The evidence shows that in every year with respect to which remission is claimed, there was at least one good crop and there was sufficient supply of water in the tank for 2 or 3 months.

In the result I would confirm the judgment of the District Judge and dismiss both the appeal and the 1st defendant's Memorandum of Objections with costs.

Munro J.:—As my learned brother would confirm the decree of the Court below, this appeal is dismissed with costs of the 1st respondent. The Memorandum of Objections is dismissed with costs of the 1st respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Veerappa Naick v. Muthusami Naick.

Veerappa Naick and others ..	Appellants * (*Defts.* 2 & 3).
v.	
Muthusami Naick and others ..	Respondents 1 & 4 (*Plaintiffs*).

Minor—Mortgage by guardian—Onus—Reviving time-barred debts.

A mortgagee of a minor's estate is bound to prove that the mortgage was executed by the guardian for purposes binding on the minor.

The guardian of a minor has no authority to bind a minor's estate by reviving time-barred debts.

The Advocate-General P. S. Sivaswami Aiyar for appellants.

K. Srinivasa Aiyangar for respondents.

The Court delivered the following

JUDGMENT.—The District Judge is wrong in throwing the burden of proof on defendants Nos. 2 and 3. The mortgage

* A. No. 648 of 1910. 21st March, 1910.

Veerappa Naick v. Muthusami Naick.

was executed by the mother on behalf of her minor sons. The mortgagee is bound to show that it was executed for purposes binding on the minors.

It is admitted for the 1st respondent that the father's debts were barred at the date of the mortgage. The guardian of the minor son has no authority to bind a minor's estate by seeking to revive them. See *Chinnaya* v. *Gurunath*[1]; *Suryanarayana* v. *Narindra Thatraz*[2]; *Sobhanadri Appa Row* v. *Sriramulu*[3]; *Subramania Iyer* v. *Arumugam Chetty*[4].

We must, therefore, reverse the District Judge's decree and restore that of the District Munsif with costs here and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

In re Rangasami Naidu, son of Venkatarama Naidu .. .. 2nd Accused*
(*Petitioner*).

Penal Code, S. 166—"Direction of the law"—Service of notice—Representation of notice to be warrant.

A peon whose business it was merely to require the signature of the person on whom the notice is to be served to an acknowledgment of the service disobeys a direction of the law within the meaning of S. 166, Indian Penal Code, by representing that the notice is a warrant and arresting the person under colour of the alleged warrant.

Petition under S. 439 of the Criminal Procedure Code praying the High Court to revise the conviction and sentence passed by the Divisional Magistrate of Tuticorin in Cr. A. No. 87 of 1909 (C. C. No. 2 of 1909) on the file of the Court of the Taluq 2nd Class Magistrate of Ottapidaran.

P. R. Sundara Aiyar for the petitioner (2nd accused).

The Public Prosecutor—contra.

The Court made the following

ORDER:—The 2nd accused, a peon in the Subordinate Court of Tuticorin, was entrusted with a notice for service on the complainant. The duty of the 2nd accused under the law was merely to require the signature of the complainant to an acknowledgment of service of the notice. This direction of the law the 2nd accused disobeyed, for he represented the notice to be a warrant and actually arrested the complainant under color of the alleged warrant.

We think the 2nd accused was rightly convicted under S. 166 of the Indian Penal Code, and dismiss the petition.

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1. (1882) I.L.R. 5 M. 169.
2. (1896) I.L.R. 19 M. 255.
3. (1894) I.L.R. 17 M. 221.
4. (1903) I.L.R. 26 M 330.

*Cr. R. P. No. 400 of 1909.
Cr. R. C. No. 535 of 1909.
30th March, 1910.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Kumar Hari Narayan Singh Deo Bahadur .. Appellant*

v.

Sriram Chakravarti and others .. Respondents.

Narayan Singh v. Sriram Chakravarth

Zamindar—Permanent tenant—Underground rights.

Where the title of the zamindar to a village as part of his zamindari before the creation of a permanent tenancy is established, he must be presumed to be the owner of the underground rights thereto appertaining, in the absence of evidence that he ever parted with them.

[*Sriram Chakravarti* v. *Hari Narain Singh Deo* [1] reversed.]

Appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 28th day of July, 1905, which reversed a judgment and decree of the Court of the Additional Subordinate Judge of Burdwan, dated the 16th day of July, 1903.

The principal question for determination on the appeal was whether the respondents had acquired any right or title to the underground minerals underneath a village Petena, which is a *mal* village situate within the ancestral zamindari of the appellant.

On the 7th day of July, 1900, the appellant's representative and another, as plaintiffs, instituted the suit giving rise to the present appeal, in the Court of the Subordinate Judge of Burdwan, against Babu Sasi Bhusan Raha and Mr. W. H. Mylne, constituting the firm of Mylne & Co., as defendants. The plaint alleged that the Pachete Estate, generally known as the Chakla Panchkote, was the ancestral revenue-paying zamindari of the first plaintiff, which had been brought under the protection of Act VI of 1876, and the second plaintiff was the manager of the estate under the said Act; that the village Petena was a *mal* village within the said estate and was held by three persons, named Nanda Lal Goswami, Digambar Goswami and Jadu Nath Goswami, on payment of an annual rent

* 1910, April 14 and 15, and May 7.

1. (1905) I. L. R. 33 C. 54.

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of Rs. 22-15-6 to the said estate; that the minerals including coals within the said village were never let out to any person by the zamindars of the Pachete Estate and were the *khas* property of the estate; that in the month of August, 1898, it was brought to the notice of the second plaintiff that the defendants, Messrs. Mylne & Co., had commenced mining operations in the said village, and when the said defendants were asked by a written notice to state the right and title under which they were carrying on those operations, and the quantity of coal already taken away by them, they, by a petition, dated the 17th day of October, 1898, ignored the plaintiff's title and refused to submit any accounts; and that the said defendants had no right to the coal mines of the said village. The plaintiffs prayed for a declaration of their right and title to the underground minerals of the said village of Petena, for *khas* possession of the same, for a declaration that the defendants had no title to the underground mines of the said village, for a permanent injunction restraining the defendants from working the mines underneath the said village, and for damages in respect of the value of the coal removed.

The said defendants, by their written statement, contended that they were *bona fide* lessees under certain persons named Chakravartis and Namtirthas, and had worked the coal mines from the 22nd Baisakh, 1301; that they relinquished their lease on the 18th day of June, 1899, before the institution of the suit; that the plaintiffs had no subsisting cause of action; that they had paid off all just dues to their lessors, and were not in consequence liable to the plaintiffs for damages; that their lessors had a mokurari and mourasi lease of the entire rights of the said village from certain Goswamis, and were in the enjoyment of the same; that the said Goswamis had acquired the said village before the permanent settlement on behalf of Thakur Gopi Nath Jiu, as an absolute gift, without any reservation whatsoever, by a grant made by the owner of the Pachete Estate; that the village was the debottar property of the Thakur, and was possessed by the Goswamis as shebaits from before the permanent settlement, claiming therein an absolute proprietary right, subject only to the payment of an annual revenue to the Government through the Zamindar of the Pachete Estate; and

that the Goswamis, Chakravartis and Namtirthas were necessary parties to the suit.

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In pursuance of two orders of the Court the above-named respondents, or their representatives, and seventeen others were made defendants, who were collectively referred to in the record as the Chakravartis, the Namtirthas and the Goswamis. Of these additional defendants only the respondents contested the suit, while all the others, including the Goswamis, though duly served, did not enter appearance.

The respondents filed two written statements of defence denying that the said village was *mal* of the Pachete Estate, and relying upon the pleas raised by the defendants, Messrs. Mylne & Co. They further pleaded *inter alia* that by a mokurari pottah dated the 7th Magh, 1228 B. S. (1821 A. D.) the said Goswamis, the shebaits of the said Thakur Gopi Nath Jiu, transferred to their predecessors all rights, including the mineral rights, in the said village, and that they had acquired by prescription, title to the underground rights in the said village.

The case appears to have been transferred to the Court of the Additional Subordinate Judge, who framed the issues, of which it is necesary to mention here only the following:—

1.—Whether Mouzah Petena is a *mal* village of the Pachete Estate?

2.—Whether it is the debottar property of Sri Sri Gopi Nath Jiu held by the Gossains of Murshidabad by payment of a *revenue* through the Pachete Estate? Is it "Mogoli debottar" of the Gossains?

5.—Have the plaintiffs ever been in possession of the underground rights of the disputed mouzah within the last twenty years?

6.—Are the plaintiffs estopped by their conduct from claiming the underground rights of the mouzah in dispute as their *mal* property?

7.—Have the plaintiffs any claim to the underground and mineral rights of the disputed mouzah? What rights have they to the mouzah?

8.—Did the plaintiffs ever reserve the mineral and underground rights of the disputed mouzah? If not, can they claim these rights?

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After recording oral and documentary evidence adduced by both parties the Additional Subordinate Judge delivered his judgment on the 16th day of July, 1903. As regards the first and second issues he held that the village Petena was the *mal* property of the first plaintiff's zamindari, that it was not the revenue-paying Shikmi Taluk or Mogoli debottar of the Goswamis, and that there was nothing to show that the village was granted by the Rajah of Pachete to Thakur Gopi Nath Jiu as an absolute gift. He was of opinion that the two deeds, respectively dated the 6th and 7th Magh, 1228 B. S., and certain rent receipts produced by the respondents in support of their alleged title were all forged documents. He decided the fifth and sixth issues in favour of the plaintiffs. On the seventh issue he held that the first plaintiff had a proprietary right to the minerals, that the Rajah of Pachete never granted such rights to the Goswamis or to any person, and that the Goswamis were tenants in respect of the "surface" only, and did not acquire any underground rights. On the eighth issue he was of opinion that the Rajah granted only the surface rights, and the minerals did not pass along with the surface, and that in the absence of production of any lease in writing granting the Goswamis the underground rights, the plaintiffs must be presumed to have reserved those rights. In the result the Additional Subordinate Judge, on the same date, decreed the suit declaring the plaintiff's right to the minerals (including coal) underneath the said village and giving the plaintiffs possession of the same; declaring also that the defendants had no right or title to the underground minerals (including coal) underneath the said village, and permanently restraining the defendants from excavating coal in the said village or otherwise interfering with the plaintiff's rights to the underground minerals of the said village; and awarding the plaintiffs Rs. 2,000 as damages and costs with future interest at the rate of 6 per cent. on the said amount of damages and costs to be recovered from all the defendants (including the respondents) other than the Goswamis.

Against the said decree of the Additional Subordinate Judge the respondents appealed to the High Court. The appeal was heard by two learned Judges, *Pargiter* and *Pratt* JJ. of the High Court who, on the 28th day of July, 1905, delivered their

judgments. They upheld the findings of the lower Court that the respondents had not proved any title by prescription to the underground rights in the said village, and that the said village was part of the first plaintiff's zamindari, and was not a Mogoli estate. Both the learned Judges agreed with the opinion of the Additional Subordinate Judge that the two deeds of the title, dated the 6th and 7th Magh, 1228, B.S., respectively, were spurious. Mr. Justice *Pargiter*, however, thought that the respondents had held the village in mokurari for many years, though it was not clear how long they had held it, but that it was not necessary to consider whether the mokurari tenure of the respondents was valid or not, because, if the Goswamis' tenure were valid, and if it included the underground rights, the plaintiffs' claim must fail. And he held that the Goswamis' tenure was a permanent one created by the first plaintiff's predecessor a long time ago; that it was a debottar property held in the name of the idol Gopi Nath Jiu, and that its rental was fixed in perpetuity. The learned Judge further held that when such terms are enacted, the Zamindar invests the tenure-holder with every right that can appertain to him short of the quit-rent due owing to the proprietorship, and that the underground rights belonged to permanent tenures. M. Justice *Pratt* concurred in the judgment delivered by his learned brother, but observed that at first he was inclined to doubt whether the grant of a permanent tenure should be held to include mines where not expressly reserved, but that in Bengal, the grantors of such tenures considered that they had parted with all their interests in the soil and were entitled only to quit-rent reserved. In the result the High Court made a decree dated the 28th day of July, 1905, dismissing the suit with costs. For a full report of the judgment of the High Court see *Sriram Chakravarti* v. *Hari Narain Singh*[1].

Against the said decree of the High Court the appellants appealed to His Majesty in Council.

Sir *Robert Finlay*, K. C., *De Gruyther*, K. C., and *J. M. Parikh* for the appellant :—The actual grant to the Goswamis is not in evidence. But there are on record two decrees for rent against them. In one of them they are described as "cultivators," and

1. (1905) I. L. R. 33 C. 54.

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in the other as "britti holders." They are tenants of the appellant zamindar who is the proprietor of the village—Bengal Regulation I of 1793 and Regulations of the Bengal Code, by C.D. Field, Calcutta, 1875, p. 36. It is for the lessee to prove the terms of the lease. The title being in the zamindar, as found by both Courts in India, it is for the tenant to establish any particular right claimed by him, and if the tenant fails to establish it the zamindar must be presumed to have the same—*Wise* v. *Bhoobun Moyee Debi Chowdrainee*[1] and *The Secretary of State for India in Council* v. *Luchmeswar Singh.*[2] The respondents have failed to discharge the onus that rests upon them and the appellant must be presumed to have the right to minerals.

The tenancy is either agricultural or not. If it is the former, the land must be used for agricultural and analogous uses, as what is leased is not the land itself, but the use of it for a specific purpose. Courts in India are bound? to administer English law, where no special Indian law was applicable. The case must be decided by justice, equity and good conscience, which is generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances—*Waghela Rajsangji* v. *Shekh Masludin.*[3] Under English law a lease of land (without mentioning mines) will entitle the lessee to work open but not unopened mines—*Clegg* v. *Rowland*[4] and *Elias* v. *Snowden Slate Quarries Company.*[5] In India perpetual leases are recognised, and the rule of English law relating to the right of a lessee in respect of minerals applies to all leases in perpetuity.

If the tenure in the present case is not agricultural, the Transfer of Property Act (IV of 1882), S. 108 (*o*) applies. Chapter V of that Act does not apply to leases for agricultural purposes —Act IV of 1882, S. 117. The law in S. 108 (*o*) is according to justice, equity and good conscience, and applies to a lease created before the passing of Act IV of 1882. The Goswamis under it have no right to minerals.

1. (1865) 10 M. I.A. 165, at p. 171.
2. (1886) I.L.R. 16 C. 223 at p. 231. (P.C.)
3. (1887) I.L.R. 11 B. 551 (P.C.)
4. (1866) L.R. 2 Eq. C. 160.
5. (1879) L.R. 4 Ap. Cas. 454 at pp. 461.

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The High Court held that the zamindar has no reversion when the tenure created is permanent, and therefore the tenant must be held to have the rights to the minerals. It is submitted that, even if the zamindar has no reversion, it would not go towards proving that the Goswamis had the right to the minerals. But a zamindar has reversion on a breach of covenant or a denial of his title by the tenant, and a permanent lease is not, as held by the High Court, tantamount to a conveyance of the land in fee simple—*Kally Das Ahiri* v. *Monmohini Dassee*[1], and *Abhiram Goswami* v. *Shyama Charan Nandi*.[2].

[*Lord Macnaghten* :—Who has the right of cutting the trees ?] In this case there is evidence to show that the zamindar has the right of cutting the trees. Ownership in trees is in the proprietor—*Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal*[3].

The High Court in deciding the case has relied upon the Land-Law of Bengal, by S. C. Mitra (Calcutta, 1898, pp. 393 and 395,) but Mr. Mitra gives no authority for his opinion. The only authority in support of the decision of the High Court is the case of *Megh Lal Pandey* v. *Rajkumar Thakur*,[4] which was decided upon the authority of this case and is now under appeal.

Where there is only a grant of rents and profits, no rights to open mines and remove minerals pass thereby—*Tituram Mukerji* v. *Cohen.*[5]

The High Court appears to think that as the Goswamis have permanent, heritable and transferable rights, they have the rights of an owner. But that is an erroneous view. Under the Bengal Tenancy Act (VIII of 1885) there are three classes of persons—*viz.*, a permanent tenure holder, a tenant at a fixed rent and an occupancy tenant, whose rent can be enhanced under the terms of that Act—who have those three rights. But it cannot be maintained that each of them has the right to minerals. Reference was made to the Bengal Tenancy Act (VIII of 1885) Ss. 4, 5, 6, 10, 11, 12, 13, 14, 15, 18, 19, 20, 25, 26, 27, 159 and

1. (1897) I.L.R. 24 C. 440 at pp. 446 & 447.
2. (1909) L.R. 36 I. A. 148 at pp. 166 & 167.
3. (1894) I.L.R. 22 C. 742 at p. 750.
4. (1906) I.L.R. 34 C. 358
5. (1905) I.L.R 33 C. 203 (P.C.)

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179; the Transfer of Property Act (IV of 1882) S. 8; and Regulations of the Bengal Code, by C. D. Field (Calcutta, 1875) pp. 36 and 39. The case of *Lal Sahoo* v. *Narain Singh*[1] was also relied upon.

G. E. A. Ross, for the respondents:—The lease in this case is a *mokurari* lease, and nothing was said in the High Court as regards its validity. The argument of the learned counsel on the other side was not raised in the Courts below. It is for the appellant to show that there was reservation of the mines when the grant was made to the Goswamis. Both Courts have found that there was no reservation made by the grantor and it is, therefore, submitted that the decree of the High Court is right.

It is not admitted that the lease here is agricultural or otherwise. It is a grant out and out. The Transfer of Property Act does not apply in this case, as the tenure here was created before the passing of that Act—Transfer of Property Act (IV of 1882) S. 2 (*c*).

[*Sir Arthur Wilson.*—The Transfer of Property Act is very largely based on English law. It is not based entirely on Indian law.]

There is no such thing as a permanent lease in English law, and the English cases, relating to mining rights, relied upon, do not apply here. *Kally Dass Ahiri* v. *Monmohini Dassee*[2] was distinguished, and the argument of the High Court in its judgment under appeal was relied upon.

De Gruyther, K. C., in reply, further referred to the Bengal Rent Act (X of 1859) Ss. 15 and 16; Bengal Regulation VIII of 1793, S. 5, and *Hari Mohun Misser* v. *Surendra Narayan Singh*[3].

The Judgment of their Lordships was delivered by

Lord Collins:—The appellants are the Rajah of the Pachete Estate and the Manager thereof under Act VI of 1876.

The question in the case is as to the right to the minerals lying under a certain village called Petena, situate within the ancestral zamindari of the first appellant. The case has been left singularly bare of evidence, and must be decided chiefly by

1. (1878) I.L.R. 3 C. 781. 2. (1897) I.L.R. 24 C. 440 at pp. 446 and 447.
3. (1907) I.L.R. 34 C. 718 (P.C.)

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giving effect to the proper presumptions arising out of a small number of ascertained facts. Happily the field of controversy has been narrowed by certain concurrent findings of fact. Both Courts are agreed that about 60 years ago, in the time of the first plaintiff's predecessor, a transaction took place whereby the latter appropriated to a certain Hindu idol known as Thakur Gopi Nath Jiu, of whom certain persons known in these proceedings as the Goswamis, or Gossains, were the *shebaits* or priests, an interest of some sort in the village of Petena, at an annual rental of Rs. 22-15-6. There is no document or evidence defining the terms of the arrangement with the idol set up at the trial. The defendants, however, against whom the plaintiffs first took proceedings to restrain interference with their minerals, purported to justify their trespasses under the authority of the Goswamis under whom they claimed to hold a lease. Two leases of the 6th and 7th Magh 1228, respectively (1821 A.D.), purporting to have been granted by the Goswamis to the said defendants, and also certain rent receipts said to have been exchanged, were produced on the part of the defendants at the trial, but they were held by both Courts to be palpable forgeries. Both Courts have held that the village Petena is a *mal* village of the Pechete Estate, *i.e.*, it is a part of the first plaintiff's zamindari. There is no evidence whatever that the Zamindar Rajah has ever granted mineral rights in the said village to the Goswamis, or any other person. Both Courts agree that no prescriptive rights have been proved by the respondents to any underground rights in the village. The language of the High Court is quite explicit:—

"There is no evidence regarding the extent, publicity, or continuity of such operations to establish the *Mokuraridars* acquisition by prescription of the underground rights claimed."

The Subordinate Judge finds that there is no evidence to show that the plaintiffs Nos. 1 and 2 were aware of the exercise of any underground rights before 1898, when steps were immediately taken to stop it. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Goswamis were put in, in one of which they were described as "cultivators," in the other as "britti holders."

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On this meagre foundation of fact the two Judges who constituted the High Court have built up the theory that the Goswamis were tenure-holders having permanent, heritable and transferable rights. Says *Pargiter* J.:—

"When such tenures are created the zamindar invests the tenure-holder with every right that can appertain to him short of the quit rent due to the proprietorship; the tenure is permanent, heritable and transferable; its rental is as fixed as the Government revenue that the zamindar pays; and the tenant can do what he likes with it, short of altogether destroying it; in short he has all the rights of proprietorship except the name. In such a state of their respective rights there is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure; and that the landlord can never work them because he has no reversion and no right to enter the land for that purpose. In my opinion the underground rights belong to the permanent tenures."

No decided case was cited in support of the view of the High Court, which seems practically to ignore the distinction between the mere tenure-holder and the zamindar, and the law as laid down in the passage cited from Mitra's Land-Law of Bengal does not appear to quite accord with the view of Mr. Field in his admirable introduction to the Bengal Regulations, p. 36, where he says:—"The zamindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zamindari, and the rights of mining, fishing and other incorporeal rights are included in his proprietorship." It would seem, therefore, that Mr. Field did not regard his letting the occupancy right as presumptive evidence of his having parted with his property in the minerals. In the case of leases under the existing law of 1882 no right arises for a lessee to work mines not open when the lease was granted. The learned Subordinate Judge inferred from the smallness of the *jumma* fixed that only the surface rights and nothing more were intended to be let out to the Gossains. On the whole it seems to their Lordships that the title of the Zamindar Rajah to the village Petena as part of his zamindari before the arrival of the Goswamis on the scene, being established as

it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced. Their Lordships will humbly advise His Majesty that the decision of the High Court be set aside, and that of the Subordinate Judge restored with costs here and below.

Solicitor: Mr. *Edward Delgado* for the appellant.

Solicitors: Messrs. *T. L. Wilson & Co.* for the respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Ghazaffar Ali Khan .. Appellant*

v.

Musammat Kaniz Fatima & another .. Respondents.

Ghazaffar A[illegible] v. Kaniz Fatin[illegible]

Mahomedan Law — Legitimacy—Prostitute mother — Prolonged cohabitation— Presumption of marriage—Father acknowledging the mother as his wife—Evidence.

Where the question was whether the appellant, a Mahomedan, was to be regarded as the legitimate son of his father:

Held, that prolonged cohabitation might give rise to a presumption of marriage, but that presumption was not necessarily strong and did not apply in a case where the mother, before she was brought to the father's house, was a prostitute; and, that, there being no evidence of marriage between the parents of the appellant, prolonged cohabitation between the parents, certain instances in which the deceased father was said to have acknowledged the mother as his wife, and the fact that two of the appellant's sisters, whose legitimacy was as much open to question as his own, were married to respectable men and the marriages were conducted with due formalities, did not establish that the appellant was born in wedlock, and was legitimate.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, dated the 23rd July, 1906, which reversed a judgment and decree of the Subordinate Judge of Sitapur, dated the 3rd August, 1905.

The question for determination on the present appeal is the legitimacy of the appellant.

One Muzaffar Ali died on the 8th April, 1890, leaving him surviving his brother Nasir Ali; Zohra Bibi, his wife, who was childless; Phundan, who claimed to be his second wife, and Ghazaffar Ali, a son born to him of Phundan.

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* 1910, March 9 & 10, and April 29.

Ghazaffar Ali v. Kaniz Fatima.

Muzaffar Ali left property in the Sitapur and the Bara Banki district, which consisted of certain villages and shares of villages, that in the Sitapur district being an 8 annas share in Mauza Bambhauri, and it was the 8 annas share which was the property in dispute.

On the death of Muzaffar Ali, Zohra Bibi, Ghazaffar Ali and Nasir Ali applied for mutation of their names in place of Muzaffar Ali in respect of his property. In the Bara Banki district mutation was made in the names of Zohra Bibi and Ghazaffar Ali jointly, while in the Sitapur district mutation was effected in the name of Nasir Ali.

Zohra Bibi disclaimed, by a deed, dated the 10th January 1899, any interest in the property, and died during the pendency of the suit.

Nasir Ali gifted all his property to his daughter, Kubra Bibi, including the 8 annas share in Mauza Bambhauri. Kubra Bibi died a few months after Nasir Ali, whose death occurred in the year 1900.

On the 12th March, 1902, appellant instituted the present suit in the Court of the Subordinate Judge of Sitapur to recover from the respondents, the representatives of Kubra Bibi, possession of the 8 annas share in Mauza Bambhauri with mesne profits.

In answer to the claim the respondents filed a written statement, and pleaded among other defences, that Musammat Phundan was not married to Muzaffar Ali, and Ghazaffar Ali was, therefore, illegitimate.

On the pleadings, the Subordinate Judge fixed a number of issues, but the only issue relevant to the appeal was the following :—

(3) Whether Ghazaffar Ali Khan was born in 1888-89 or in 1885-86?

(*a*) Whether or not he is a legitimate son of Muzaffar Ali Khan?

Issue No. 3.—" This is one of the two main issues on which this case hinges. On this head I am clear that Musammat Phundan (though she is pleased to call herself Phundan-un-nisa, which is not only ungrammatical but meaningless) was a public prostitute. I cannot believe for a moment that a man of the

position and means of Muzaffar Ali Khan, finding himself childless from the *biradari* wedded wife, Zohra, took it into his head to propose to a prostitute, or the daughter of a prostitute or a pimp, hoping by the alliance to beget children. It is in this country proverbial that prostitutes are averse to beget children as it hinders their nasty avocation. There is nothing on record to show that Chaudhri Muzaffar Ali Khanzada was reduced to such a state, as far as his personality, age, health and means were concerned, that no Khanzada or other gentleman in the country would have offered him his daughter or sister for a wife. The strongest presumption is that he saw her dancing somewhere, became enamoured of her and took her for his concubine or wife. Now the only thing to be seen is whether it was in the capacity of a concubine or in that of a wife that he took her. I am induced to believe that it was in the capacity of a wife that he took her. The reasons for this conclusion are that a prostitute would not confine her behind the *purdah* unless she was of her position (*sic*), and secondly, there is evidence of Haji Abbas Husain Khan, of Babupur, and Sheikh Inayet-ul-lah, himself a Taluqdar and a leading man of the province, that the Chaudhri (Muzaffar Ali Khan) admitted before them that he had espoused Phundan as his wife, since she was not seen out of the *purdah* or carrying on the avocation of a public prostitute or dancing girl. Every Indian knows that second marriages, particularly with women like Phundan, are not carried on with song or mirth. The treatment which she received afterwards at the hands of her husband was of the most cordial nature. Her daughters were married with pomp befitting the occasion, position and means of the family in some of the best of families of Khanzadas (Ghani Ahmad and his brother). That a brother of Ghani Ahmad repudiated his wife does not show that he had married her for money or property. Exhibit. *A*-1 proves that Muzaffar Ali admitted that a *nikah* had taken place between him and Musammat Phundan—if it was not Musammat Phundan who else she was. The plaintiffs are unable to point out any one else. On the 26th April, 1883, Muzaffar Ali deposed before Mr. Lincoln, District Judge, that he had another wife of the family of prostitute, the daughter of Badar Ali or Baddi Ali who was Pathan's son; *nikah* had taken place between them.

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It is clear that when this statement was made, there was no question of the succession to the property of Muzaffar Ali,and no necessity for him to speak untruth at the time in respect to his wife and children. If the admission does not operate as an acknowledgment, and even if it amounts to an acknowledgment it is not sufficient to make the woman the wife of a man, still it is a strong evidence of a deceased person's relation with a woman. Much has been made of the fact that about 30 years ago, Phundan was seen dancing at several places while the date of her marriage or *nikah* is given as *Shawal* 1870. The very nature of the reply or statement shows that it is a mere matter of guess. The month is Arabic and the year English. It is inconceivable that a woman remembered the Arabic month and English year of her marriage. In the second place though a woman might not be living habitually in seclusion or behind the *purdah*, she is invariably kept in *purdah* at the time of her *nikah*, and under such circumstances she is not in a position to know who the Agent (Vakil) and the witnesses of the *nikah* are, nor is she expected to remember the year of the *nikah*. Now when Muzaffar Ali made the statement before Mr. Lincoln, Ghazaffar Ali was not born, and his birth after the admission of *nikah* by his father with his mother makes him legitimate if nothing else. Daryao Lal says that Ghazaffar Ali must have been born in 1887. Colonel Grigg was of opinion that Ghazaffar Ali was born about a year and half before the death of Muzaffar Ali which took place in 1890 (Exhibit No. 3). Plaintiff's own witness, Zamin Husain (Witness No. 3) says that on the occasion of his daughters' marriage he invited the witness telling him in the invitation letter that his daughters were going to be married, and he cheerfully bore the expenses and managed the marriage of his daughters with Ghani Ahmad and Ali Ahmad, Khanzadars. I, therefore, find that Ghazaffar Ali is the legitimate son of Muzaffar Ali Khan."

The Subordinate Judge made a decree in favour of the appellant for possession and mesne profits.

Against that decree the respondent appealed to the Court of the Judicial Commissioner of Oudh, and on the 23rd July, 1906, that Court delivered judgment and reversed the decree of the

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Subordinate Judge with costs. The judgment on the issue now material was as follows :—

"The learned pleader for the plaintiffs-appellants has contended that although there is a general presumption in favour of legitimacy amongst respectable people, yet as it is admitted that Musammat Phundan was in the first instance a prostitute, there is no presumption that the cohabitation between Muzaffar Ali Khan and Musammat Phundan was preceded by any legal union, and in support of this contention he has cited the case of *Musammat Jariut-ool-Butool* v. *Mussammat Hoseinee Begum.*[1] He has also contended that when Muzaffar Ali Khan gave evidence in 1883, he was obliged, when questioned about this second woman, to say that she was his wife, because he would be ashamed to say in open Court that he was keeping a prostitute together with his wife, and secondly, because his evidence would have been useless for the object with which he was called, unless he had declared that Musammat Phundan was his wife. It is also contended that there is ample evidence to show that Musammat Phundan continued to carry on her profession as a dancing girl long after 1870, the year during which it is alleged that the marriage took place. The evidence of the witnesses called to prove that Musammat Phundan continued to dance at marriages and other ceremonies after 1870 does not impress me in the least, but there is one important fact which throws great doubt on the alleged marriage in 1870. When the case was instituted early in 1902, the pleader for the respondents alleged that the marriage had taken place about 20 years before, *i. e.*, about 1882. This date was put back to 1870 by a statement subsequently made in December, 1902. If any marriage had really been celebrated in 1870, is it possible that Musammat Phundan or any of her friends had no knowledge of the exact date and could not fix it accurately at once when the cases were called on for hearing? I refer also to the evidence of Daryao Lal, Witness No. 16 for the plaintiffs-appellants, who was in the employ of Muzaffar Ali Khan for 38 years. He says the eldest daughter was born in 1876, the second in 1877, the third in 1879, the fourth, fifth and sixth in rapid succession, annually, probably up to 1882. The plaintiff Gazaffar Ali appears to have been born some years later, probably

1. (1867) 14 M. I. A. 194.

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1888 or 1889. Now, to my mind, it is extremely improbable that if regular cohabitation had commenced between Musammat Phundan and Muzaffar Ali Khan in 1870, after the alleged marriage, that there would have been no issue of this marriage until 1876. Evidently Musammat Phundan was a young woman then, who would, in the ordinary course of nature, be likely to give birth to a child within a year or 15 months after cohabitation commenced; and my opinion, therefore, is that no cohabitation took place between Musammat Phundan and Muzaffar Ali Khan until 1875. Then, Musammat Phundan being a prostitute, Muzaffar Ali Khan found it an easy task to induce her to consent to live with him, and afterwards, when her children appeared in rapid succession and no children born to his legal wife Musammat Zohra, Muzaffar Ali Khan considered it advisable to make the best of the existing state of affairs, and therefore gave out that he was married to Musammat Phundan and recognized her as his wife whenever he spoke about her. In order to provide maintenance for her after his death, he had an 8 annas share in Sadrawan recorded in her name in 1887 at a time when she had given him six daughters This was evidently done as a provision for this family. It is true that in his petition in this matter he describes Musammat Phundan as "*zouja apni*", but he does not describe her as "*zouja mankuha apni.*" If Muzaffar Ali Khan had then, regarded her as his legal wife, why was it necessary to make this special arrangement ? Under Mahomedan Law, on his death, she would have succeeded to a share of one-eighth in the whole estate—a share which has never been demanded by her up to date. It is true that her son Ghaffar Ali has been in possession of the bulk of the property since 1890, and this may account for the fact that Musammat Phundan has never claimed her share as the legal widow of the deceased, but it is a significant fact that she has never attempted since her alleged husband's death to be placed in such a position that her status as his legal widow would be no longer a subject of controversy.

"The above considerations lead to the conclusion that in spite of the fact that Muzaffar Ali Khan and Musammat Phundan cohabited together as man and wife from about 1875 to 1890, and that Muzaffar Ali Khan had on several occasions

acknowledged Musammat Phundan as his wife, yet there is absolutely no reliable evidence of any kind of the celebration of any legal marriage in 1870, and, for reasons given above, there is every ground for believing that cohabitation between Muzaffar Ali Khan and Musammat Phundan did not, as a matter of fact, commence before 1875. I would, therefore, decide that Ghazaffar Ali Khan is not proved to be the legitimate son of the deceased, and his suit to recover possession of the share in Bambhauri should have been dismissed." Ghazaffar Al v. Kaniz Fatima

The appellant, thereupon, appealed to His Majesty in Council.

G. E. A. Ross and *B. Dube*, for the appellant:—The Subordinate Judge was right in holding that the appellant was the legitimate son of Muzaffar Ali, who twice acknowledged that he had married Phundan. The children of this union were treated as legitimate children, and such treatment raises a presumption that there was a marriage between their parents. Two sisters of the appellant were married in one of the most respectable families. Under the circumstances of this case it must be presumed that Muzaffar Ali and Phundan were married and that the appellant is legitimate—*Khajah Hidayut Oollah* v. *Rai Jan Khanum*[1]; *Mahomed Bauker Hoossain Khan* v. *Shurfoon Nissa Begum*[2]; *Ashrufud Dowlah Ahmed Hossein Khan Bahadoor* v. *Hyder Hossain Khan*[3]; *Mussumat Jariut-ool-Butool* v. *Musammat Hoseinee Begum*[4]; *Ranee Khujooroo Nissa* v. *Musammat Roushun Jehan*[5]; and *Nawab Muhammad Azmat Ali Khan* v. *Musammat Lalli Begum*[6].

DeGruyther, K.C., and *S.A. Kyffin*, for the respondents:—The evidence relating to the marriage of Phundan with Muzaffar Ali has been found absolutely untrue. No marriage by repute is here set up. It is a settled Mahomedan law that a child born out of wedlock is illegitimate and a child born in wedlock is legitimate. Reference was made to *Mahomed Bauker Hoosain Khan* v. *Shurfoon Nissa Begum*[2]; *Ashrufud Dowlah Ahmed Hoosein Khan Bahadoor* v. *Hyder Hoosein Khan*[3];

1. (1844) 3 M. I.A. 295
2. (1860) 8 M. I.A. 136 at p. 159.
3. (1866) 11 M. I.A. 94.
4. (1867) 11 M. I.A. 194,
5. (1875) I.L.R. 2 C. 184 (P. C.)
6. (1881) I.L.R. 8 C. 442 (P.C.)

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and *Digest* of *Anglo-Muhammadan Law*, by Sir R. K. Wilson, 3rd Ed., pp. 162 and 165, articles 84 and 86. The only evidence on the question of the treatment of children is that relating to the marriage of two sisters of the appellant on the same day. One of them was divorced and the other died. No leading man present at the wedding was called to show that any leading person was present.

As regards the statements made by Muzaffar Ali, they have been considered by the lower appellate Court, and it is submitted that that Court came to a right conclusion.

The onus of proving legitimacy is upon the appellant, who has failed to discharge it.

G. E. A. Ross, in reply, on the meaning of *nikah*, referred to *Muhammadan Law* by Syed Ameer Ali, 3rd Ed., pp. 332 and 333; and *Digest of Anglo-Muhammadan Law*, by Sir R. K. Wilson, 3rd Ed., p. 82.

The Judgment of their Lordships was delivered by

Sir Arthur Wilson:—This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, which overruled the decision of the Subordinate Judge of Sitapur.

The suit out of which the appeal arises was brought by the present appellant in the last-mentioned Court to establish title to and recover possession of an eight-annas share in the village of Bambhauri, the plaintiff's claim being based upon his alleged right to recover the property in question as heir to his father Chaudhri Muzaffar Ali Khan. About the parentage of the appellant there is no dispute, and of all the questions raised in the case, one only remains for consideration on the present appeal, and that is, whether the appellant is to be regarded as the legitimate son of his father. On this question the Subordinate Judge decided in the appellant's favour, but he was overruled by the Court of the Judicial Commissioner. Their Lordships are of opinion that the learned Judges of that Court were right. It may be stated at once that the sole question is, whether on the evidence in the case, coupled with all legitimate presumption, it is shown that the appellant was born in wedlock. No question has been raised either in India or before their Lordships—such as has been raised

in many cases—as to any possible legitimation by subsequent acknowledgment or treatment. Ghazaffar A v. KanizFatin

There was no evidence of marriage between the parents of the appellant. The learned Judges fully recognised that prolonged cohabitation might give rise to a presumption of marriage, but that presumption is not necessarily a strong one, and their Lordships agree that it does not apply in the present case, for the mother, before she was brought to the father's house was, according to the case on both sides, a prostitute.

The learned Judges next notice certain instances in which the deceased father is said to have acknowledged the mother as his wife, but the effect of such acknowledgment has been rightly estimated by the learned Judges.

The next point relied upon by the appellant was that two of his sisters, whose legitimacy was as much open to question as his own, were married to respectable men, and the marriages conducted with due formalities. This is a point worthy of consideration, but it would be easy to attribute too much weight to it.

Their Lordships are of opinion that the decision of the Judicial Commissioner's Court was right. They will humbly advise His Majesty that this appeal should be dismissed.

The appellant will bear the costs.

Solicitors: Messrs. *Barrow, Rogers and Nevill* for the appellant.

Solicitors: *Messrs T. L. Wilson and Co.* for the respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.]

Present:—Lord Macnaghten, Lord Collins and Sir Arthur Wilson.

Lala Brij Narain .. Appellant *

v.

Kunwar Tejbal Bikram Bahadur .. Respondent.

Decree—Confirmation on appeal—Power of the First Court to alter it.

Held that the First Court had no jurisdiction to alter a decree after it had been affirmed on appeal by the Appellate Court.

* 1910 March 2 and April 19.

Lala Brij Narain v. Kunwar Tijbal Bikram.

Appeal from a judgment and decree of the High Court at Allahabad (February 23, 1905), which rejected an application made by the appellant to the said High Court for revision of an order, dated the 11th June, 1904, passed by the Subordinate Judge of Moradabad, amending a decree of his Court.

The facts of this case are fully set out in their Lordships' judgment.

The appeal was heard *ex parte*.

De Gruyther, K. C., and *G. E. A. Ross*, for the appellant, referred to the Civil Procedure Code (Act XIV of 1882), Ss. 209 and 206, and the Transfer of Property Act (IV of 1882), Ss. 89 and 93, and submitted that the order of the Subordinate Judge was made without jurisdiction, and was inoperative against all persons whom it purported to affect, and that the High Court erred in holding that the said order of the Subordinate Judge, which related to a joint and several decree, in favour of all the decree-holders, could stand as against the appellant, and, at the same time, could be set aside only in so far as it affected the interest of the decree-holder Lachman Das.

The respondent did not appear.

The Judgment of their Lordships was delivered by

Lord Collins:—The story out of which the points involved in this appeal arise is rather intricate. On the 5th March, 1898, the appellant and two persons, named Kishori Lal and Sri Ram, instituted a suit against the predecessor-in-title of the respondent before the Subordinate Judge of Moradabad, for the recovery of more than a lakh of rupees with future interest, by sale of property mortgaged under two documents, dated respectively the 11th May and the 13th December 1894. On the 6th May, 1898, the claim was decreed by the first Court, but in appeal to the High Court at Allahabad that Court took the view that the learned Judge had placed undue pressure upon the defendant, who had asked for a postponement on the ground of illness, to go on with the case, and accordingly set aside the decree which he had made and remanded the case for determination according to law.

On the 30th January, 1901, the case came again before the Subordinate Judge of Moradabad and resulted in a decree for

Rs. 70, 257-14-0, with future interest. Meanwhile Kishori Lal and Sri Ram had sold the whole of their interest in the decree to one Lachman Das, to whom the present appellant also transferred a part of his interest as a decree-holder, and the name of Lachman Das was added to the record. From this decree both parties appealed to the High Court. The High Court dismissed the defendant's appeal, and with a slight modification affirmed the decree of the first Court on the cross-appeal.

On the 5th October, 1901, on the application of the original decree-holders, the first Court made an order absolute for sale of the mortgaged property under Ss. 89 and 93 of the Transfer of Property Act for the amount decreed, together with future interest. Thereafter the present appellant applied to the first Court for execution of the said decree, and after certain intermediate proceedings, which it is not necessary to refer to in detail, the judgment-debtor, on the 21st November, 1903, deposited the entire amount due under the decree, with future interest.

On the 9th February, 1904, the present respondent, the judgment-debtor, applied to the first Court to amend the said decree by striking out so much of it as awarded future interest on the amount decreed. In March, 1904, petitions objecting to the application of the judgment-debtor on various grounds were filed on behalf of the present appellant and Lachman Das. With reference to the allegations of the parties the Subordinate Judge framed the following issues for trial :—

(1) Whether the judgment-debtor's application for amendment of decrees is barred by limitation?

(2) Whether the said application is barred by S. 13 of the Civil Procedure Code?

(3) Whether the decrees of this Court under Ss. 88 and 89 of Act IV of 1882 can be amended by this Court as requested by the judgment-debtor?

(4) Whether the judgment-debtor has a right to apply for amendment of the said decrees?

On the 11th June, 1904, the Subordinate Judge made an order granting the application of the judgment-debtor. He found the four issues in his favour, and amended the two decrees of the Court made under Ss. 88 and 89 of the Transfer of Property Act by striking out of them the provision for future

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interest, the effect of such amendment or modification being to reduce the amount payable under the decrees by a sum of over Rs. 19,000.

Two applications were therefore presented to the High Court by the present appellant and the said Lachman Das for revision of the order of the Subordinate Judge, dated the 11th June, 1904. They were heard by a Divisional Court, constituted by two learned Judges of the High Court, who, on the 23rd February, 1905, delivered separate judgments disposing of the two applications for revision in the following manner:

With regard to the application, 24 of 1904, they observed that the order, revision of which was asked for, was an order passed by the Subordinate Judge of Moradabad amending a decree of his Court. Previous to the order of amendment the decree had been affirmed on appeal by the High Court. The Subordinate Judge therefore had no jurisdiction to amend. The learned Judges, therefore, allowed the application and set aside the order amending the decree, but only so far as it affected the interests of the applicant Lachman Das. With regard to the application for revision, 32 of 1904, of Brij Narain, the learned Judges delivered the following judgment:—

"Looking to all the circumstances of the case, we do not think that this is a case in which we ought to exercise our discretionary power in revision. We reject the application, but make no order as to costs."

Dissatisfied with the judgment and decree of the High Court made on the said application, 32 of 1904, the present appellant applied for leave to appeal therefrom to his Majesty in Council. His application was heard by the Hon. the *Chief Justice* and the Hon. Sir *W. R. Burkitt.*

When granting the application their Lordships, after referring to the facts of the case, made the following observations:—

A Bench of this Court, on the application by Lachman Das, allowed the first application, holding that the Subordinate Judge had no power to modify his decree, after it had been confirmed by the High Court, and set aside the order complained of. In the other application, No. 32, of Brij Narain, the Bench made an order rejecting it, holding that, under all the circumstances of the case, this was not a case in which they should exercise their discretionary

power in revision. The consequence is that there are now two joint decree-holders, as to one of whom the decree contains a provision for future interest the value of which is Rs. 19,000 odd, whilst as to the other this provision does not exist. The provision of the decree, therefore, seems to be apparently inconsistent, as out of the two joint decree-holders one can execute the decree *plus* future interest, whilst the other cannot. Under these circumstances we think this is a case which we should certify to be fit for appeal."

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Their Lordships have not had the advantage of hearing the case argued for the respondent, but they think the High Court have themselves said enough to make it clear that if the decree of the first Court was made without jurisdiction as altering a decree after it had been affirmed on appeal in the case of Lachman Das, so also the alteration in Brij Narain's case was equally ineffectual, and ought not to have been allowed to stand.

Their Lordships will humbly advise His Majesty that this appeal should be allowed. The respondent will pay the costs.

Solicitors:—Messrs. *Barrow, Rogers and Nevill* for the appellant.

Solicitors:—Messrs. *Rankenford, Ford and Chester* for the respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Munshi Munnu Lal and another .. Appellants*

v.

Ghulam Abbas and others .. Respondents.

Civil Procedure Code (Act XIV of 1882), S. 456—Representation of minors—Order appointing guardian ad litem*—Absence of evidence of affidavit—Presumption of regularity.*

In a case where the question was whether certain minors were properly represented at the hearing of a suit in which the decree now impugned was made, the order appointing a guardian *ad litem* of the minors was on the record, but no affidavit required by S. 456 of the Civil Procedure Code (Act XIV of 1882) was forthcoming.

Held, that it must be presumed, in the absence of evidence to the contrary, that everything was regularly and properly done; and that the minors were properly represented by the guardian *ad litem* appointed by the Court.

(*Musammat Bibi Walian* v. *Banke Behari Pershad Singh*[1] distinguished.)

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* 1910 March 8.

1. (1903) I.L.R. 30 C. 1021 (P.C.)

Munnu Lal v. Ghulam Abbas.

Appeal from a decree of the Court of the Judicial Commissioner of Oudh (May 20, 1907), which reversed a decree of the Court of the Subordinate Judge of Barabanki (June 30, 1906).

The main question for determination on the present appeal was whether two of the four respondents, Ghulam Abbas and Ghulam Sarfaraz, were entitled to set aside a sale made on January 20, 1897, of certain immoveable property in execution of a decree passed on November 14, 1894, by the Court of the Subordinate Judge of Barabanki in favour of the appellant, Munshi Mannu Lal, against the abovenamed respondents and other sons of one Ghulam Hazarat, deceased. The only ground on which the said sale was questioned before their Lordships was that the said two respondents, who were then minors, were not properly represented at the hearing of the suit in which the said decree was pronounced.

The said Ghulam Hazarat was the owner of a share amounting to 2 annas, 5 pies, 16 karants, in a village, called Kola Gahbari. This share is hereinafter referred to as the "ancestral share." Two persons, named Kasim Ali and Makhdum Bakhsh, were owners of another share in the said village amounting to 3 annas, 2 pies, 8 karants. On April 22, 1875, they mortgaged their share with possession to a Jaisi Ram. In execution of a decree for other sums of money obtained against them by Jaisi Ram, the equity of redemption in the said mortgage was sold and purchased by one Tika Ram on February 17, 1880. Tika Ram, on September 15, 1880, sold the said equity of redemption to the said Jaisi Ram. A claim to pre-empt was asserted by Ghulam Hazarat, and, eventually, a decree for pre-emption was made in his favour on September 20, 1881. The share thus obtained is hereinafter referred to as "acquired share."

Ghulam Hazarat died in the month of May, 1885, and his four sons Ghulam Dastgir, Ghulam Razzak, Ghulam Abbas and Ghulam Sarfaraz, succeeded to his estate. The other three sons being minors, Ghulam Dastgir on January 15, 1886, applied to the District Judge of Lucknow for a certificate of guardianship, under Act XL of 1858 and on November 13, 1886, was duly appointed guardian of the persons and property of his minor brothers.

On December 20, 1889, Ghulam Dastgir, for himself and as guardian of Ghulam Abbas and Ghulam Sarfaraz, and Ghulam Razzaq, who had then attained majority, executed a mortgage of both the ancestral and acquired shares in favour of Munshi Munnu Lal, who in the year 1892 put the mortgage in suit.

On December 21, 1893, Ghulam Dastgir was removed by the District Judge from the office of the guardian of the minors. Ghulam Razzaq was appointed guardian *ad litem* of the two contesting respondents who were then minors in the said suit brought by Munshi Munnu Lal. The proceedings relating to this appointment of the guardian *ad litem* appeared on the record as follows :—

" Munnu Lal, Revenue Agent .. .. Plaintiff

versus

" Ghulam Dastgir, &c. .. .. Defendants.

"Claim for Rs. 8,740

"16th September, 1893.

" Present.

" Plaintiff with Babu Pauna Lal, Ghulam Razzaq, Defendant 2, Janki Prasad, Defendant 5.

"See application of Musammat Sitar-un-nisa, who wants " to act as guardian of the minors. Munshi Qurban Ahmed " appears for her and says she withdraws her application, and " Ghulam Razzaq be appointed guardian. Ghulam Dastgir is not " a proper person to act as guardian because he would waste " their paper *Sic*) and does not defend the case.

" (SD.) PANDIT SURAJ NARAIN.

"*Subordinate Judge.*

" Ghulam Razzaq, on *Solemn Affirmation* :—

"Wants to act as guardian of the minors. Ghulam Dastgir " is not a proper person to act as guardian.

"(SD.) PANDIT SURAJ NARAIN.

"*Subordinate Judge.*

"ORDER.

" Gulam Razzaq appointed guardian *ad litem*. Ghulam " Dastgir does not appear to defend their case.

" (SD.) PANDIT SURAJ NARAIN.

" *Subordinate Judge.*"

Munnu Lal v. Ghulam Abbas.

On November 14, 1894, Munshi Munnu Lal obtained a decree for sale. In execution of that decree both the shares were purchased by Munshi Munnu Lal and Janki Parshad, the present appellants, subject to the existing encumbrances.

On October 11, 1899, Ghulam Abbas attained majority, and on December 29, 1902, Ghulam Sarfaraz also attained majority. On December 21, 1905, they instituted the present suit in the Court of the Subordinate Judge of Barabanki. They contended, *inter alia*, that the said decree, dated November 14, 1894, was not binding on them because in the suit in which the decree was made, their brother Ghulam Razzaq (since deceased and now represented by his widow) was not duly appointed guardian *ad litem*. The plaint prayed for delivery of possession of a half share in both the ancestral and acquired property purchased by the appellants.

In their written statement the appellants pleaded *inter alia* that the said decree was binding on the plaintiffs.

The Subordinate Judge decided, *inter alia*, that the said decree of November 14, 1894, was binding on the plaintiffs, and that they were properly represented in the said suit by a guardian *ad litem*, duly appointed, against whom no fraud, collusion or negligence could be charged. He accordingly dismissed the suit with costs.

On appeal the Court of the Judicial Commissioner found *inter alia*, that the said decree of November 14, 1894, was not binding on the plaintiffs because the Court trying the said suit had not before it the affidavit required by S. 456 of the Code of Civil Procedure (Act XIV of 1882) at the time it appointed Ghulam Razzaq the guardian *ad litem*. In the result the sale in execution of the said decree was set aside and the plaintiff's suit was decreed in part with proportionate costs.

The appellants, thereupon, appealed to His Majesty in Council.

De Gruyther, K. C., and *B. Dube*, for the appellants :— Ghulam Razzaq was appointed guardian *ad litem* as required by S. 443 of the Civil Procedure Code (Act XIV of 1882.) It is contended that Ghulam Razzaq was not a proper person to be appointed and that he was appointed without any inquiry. But the provisions of S. 456 of the Code have been

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complied with. There is no affidavit on the record, but the evidence shows that the Court did make an inquiry. The pleader was questioned and he said that Musammat Sitar-un-nisa did not wish to be the guardian. Ghulam Razzaq gave evidence on affirmation and the Court made the necessary order which is now questioned after a lapse of 16 or 17 years. The ground of contention is that there was no affidavit as required by S. 456 of the Code, and, therefore, the appointment of Ghulam Razzaq is invalid, and the minors were not represented. As a matter of fact Ghulam Razzaq did, as found by both Courts in India, protect the minors' interest.

[*Sir Arthur Wilson* :—Surely it must be presumed that an affidavit was made.]

De Gruyther :—That point has been decided in the affirmative in *Musammat Bibi Walian* v. *Banka Behari Pershad Singh*[1]. If there had been no application for the appointment of a guardian *ad litem*, there could have been no affidavit. But in this case there was such an application and it must be presumed that there was an affidavit.

G. E. A. Ross, for the respondents :—S. 456 of the Code requires three things, namely, (1) affidavit, (2) proper inquiry as to the fitness of the person to be appointed as guardian *ad litem*, and (3) the decision of the Court that the person appointed is a fit and proper person.

There was no inquiry in this case, and Ghulam Razzaq was appointed on a mere application. There is no affidavit on record. He was an executant of the deed of mortgage in suit and illiterate. He was, therefore, not a fit and proper person to be appointed. Moreover, there is nothing to show the date of the application. The order of the Court appointing Ghulam Razzaq guardian *ad litem* was wholly illegal, because the imperative provisions of S. 456 of the Code did not receive compliance The case of *Musammat Bibi Walian* v. *Banke Behari Pershad Singh*[1], relied upon, did not deal with S. 456 of the Code and has no application here.

The Judgment of their Lordships was delivered by

Lord Macnaghten.—Their Lordships are of opinion that the decision of the Subordinate Judge was perfectly right.

1. (1903) I.L.R. 30 C. 1021 (P.C.)

Munnu Lal v. Ghulam Abbas.

The question is whether the respondents in whose favour a former decree, made when they were infants, has been set aside, were properly represented at the hearing of the suit in which the decree was pronounced.

The objection was that the affidavit required by S. 456 of the Code of Civil Procedure is not forthcoming. It does not appear whether in point of fact there was an affidavit or not. But assuming that there was not such an affidavit, their Lordships think it impossible now to hold that the infants were not properly represented at the time. The learned Judge appointed Ghulam Razzaq their guardian *ad litem*. The order is on the record, and it must be presumed, in the absence of evidence to the contrary, that everything was regularly and properly done.

The case that was referred to of *Musammat Bibi Walian and others* v. *Banke Behari Pershad Singh and others* [1] is really a much stronger case, because there the person who acted as guardian *ad litem* was not formally appointed, but he was recognised as guardian *ad litem* by the Court in the progress of the suit, and it was held by this Board that after that recognition it was too late to dispute his appointment.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed. The respondents must pay the costs of the appeal.

Messrs Barrow, Rogers and Nevill—Appellant's Solicitors.
Messrs. T. L. Wilson & Co.—Respondent's Solicitors.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Sri Raja Parthasarathi Appa Row
Savai Row Bahadur, Zemindargaru ..Appellant.*

v.

Chevendra Venkata Narasayya and others ..Respondents.

Parthasarathi Appa Row v. Venkata Narasayya.

Madras Acts—Rent Recovery Act, S. 11, Cl. 3—Express contract and implied contract—Implied contract, when cannot be inferred—Procedure—Payment of money rent for a period of years—Effect of.

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1. (1903) I.L.R. 30 C. 1021 (P.C.)

* 27th April 1910.

Parthasarathi Appa Row v. Venkata Narasayya.

It is not open to Courts to imply, from the mere circumstance that rent has been paid in money for a series of years, an agreement to pay money-rent. But the fact that money rent has prevailed in a particular locality for a considerable number of years may form an element in the consideration of the question of usage under Cl. 3 of S. 11 of the Madras Rent Recovery Act, VIII of 1865.

In a suit for enforcement of acceptance of *asara* patta, the tenants-defendants pleaded an express contract in Fasli 1299 when the parties executed a lease for 5 years, and in the alternative an implied contract to pay a fixed money rent. The express contract was found against by the Courts in India, but the plea of implied contract was found in favour of the tenants from the fact that rents at the same rate were paid and received for 4 years after the expiration of the term fixed by the leases of Fasli 1299.

Held :—(1) That under the circumstances no implied contract could be found. (2) That alongside of the express contract embodied in the leases exchanged in Fasli 1299 there could not be a collateral implied agreement relating to fixity of rent. (3) That there being no contract express or implied contract the proper procedure is for the lower Court to ascertain the rates payable as provided in Cl. 3 of S. 11.

Consolidated Appeals from decrees of the High Court, Madras dated, respectively, September 26, 1904, and January 19, 1905, in second appeals, which arose out of certain suits under the Madras Rent Recovery Act (VIII of 1865). S. 9.

The facts and history of the case are given in their Lordships' judgment. The suits were instituted by the Zamindar, the appellant, against certain tenants on his estate, the respondents, for a decree directing the tenants respectively to accept *puttahs*, which he had tendered for the agricultural year, Fasli 1309, and to execute *muchilikas* corresponding thereto. The Puttahs tendered required the tenants respectively to deliver to the Zamindar by way of rent, a specfic share of certain crops grown on irrigated land comprised in their holdings and to pay rent at the rate of Rs. 2-12-0 per acre for land on which 'dry' crops were raised. The question on the appeal was whether or not the Zamindar was bound to insert in the *puttah* the same terms as to rent as were contained in certain leases granted by him for a period of five years in Fasli 1299. The High Court, on second appeal, held that there was an implied contract between the Zamindar and his tenants respectively, under which the tenants were entitled to occupy their holdings in perpetuity at the rent reserved by the leases above referred to, and that the puttahs tendered should be so modified as to give affect to the implied contract, and it accordingly passed the decrees, against which the present appeals were preferred by the Zemindar.

'arthasarathi Appa Row v. Venkata Narasayya.

De Gruyther, K. C. and *K. Brown*, for the appellant, referred to the Madras Rent Recovery Act (VIII of 1865), Ss. 3, 9 and 11; and the Indian Evidence Act (I of 1872) S. 91, and submitted that there was no proof of an implied contract that the Zamindar should accept the uniform rate of Rs. 5 per acre in perpetuity. When a contract was in writing, its terms must be determined from the written contract itself. No other evidence was admissible to prove its terms. Negotiations resolving into a lease were not admissible and were not the material for ascertaining whether there was an implied contract. From time immemorial there had been disputes and settlements as to rents, which had varied from time to time and had never been permanent. They submitted that the appeals should be allowed.

The respondents did not appear.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali.—These are consolidated appeals from certain decrees of the High Court of Madras made on the 26th of September, 1904, and 19th of January, 1905, respectively.

The suits, which gave rise to the appeals, were, along with a number of others, instituted by the appellant Zamindar on the 15th of August, 1900, against his tenants of the village of Chevendra, in the Madras Presidency, under S. 9 of the Madras Rent Recovery Act (VIII of 1865) to enforce the acceptance of *puttahs* tendered by him and the execution of *muchilikas* corresponding thereto.

Although this litigation has passed through several Courts in India, the matter in controversy lies within a small compass.

Act VIII of 1865 requires landlords, specified in S. 3, to which category the plaintiff belongs, to enter into written engagements with their tenants; and no suit or legal proceeding to enforce the terms of a tenancy is sustainable unless puttahs and muchilkas have been exchanged or "unless it is proved that the party attempting to enforce the contract had tendered such a puttah or muchilka as the other party was bound to accept" (S. 7). In case of a refusal to accept a puttah such as the landholder is entitled to impose, he can proceed under S. 9 by a summary suit before the Collector to enforce its acceptance.

Section 11, which lays down the rules to be observed in the decision of suits involving disputes regarding rates, is important.

It declares that—

"(1) All contracts for rent, express or implied, shall be enforced.

"(ii) In districts or villages which have been surveyed by the British Government previous to 1st January, 1859, and in which a money assessment has been fixed on the fields, such assessment is to be considered the proper rent when no contract for rent, express or implied, exists.

"(iii) When no express or implied contract has been made between the landholder and the tenant, and when no money assessment has been so fixed on the fields, the rates of rent shall be determined according to local usage, and when such usage is not clearly ascertainable, then according to the rates established or paid for neighbouring lands of similar description and quality. Provided that if either party be dissatisfied with the rates so determined, he may claim that the rent be discharged in kind according to the 'warum', that is, according to the established rate of the village for dividing the crop between the Government or the landlord and the cultivator. When the 'warum' cannot be ascertained such rates shall be decreed, as may appear just to the Collector after ascertaining if any increase in the value of the produce or in the productive power of the land has taken place, otherwise than by the agency or at the expense of the ryot."

The rest of the section is not material to the present cases.

The puttahs tendered by the appellant required the tenants respectively to deliver to him by way of rent a specific share of certain crops grown on what are called "wet" or irrigated lands comprised in their holdings and certain money-rent for land on which "dry crops" were raised—his case being that the Asara or sharing system was the Mamool or customary mode of payment in the village of Chevendra, and that the tenants had refused to accept the Asara puttahs for Fasli 1309; hence the suits.

The tenants denied that the Asara system was in force in their village, and alleged, *inter alia*, that money rates had prevailed there for a considerable number of years "continuously

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up to date," and were the proper rates; and that by a specific arrangement entered into in Fasli 1299 (1889) an uniform rate of Rs. 5 per acre had been settled in perpetuity for the lands held by them respectively. They also took exception to the "rules, conditions, and items" in the Asara puttahs as being improper and illegal.

The two material issues framed by the first Court are (3) and (6), which are as follows :—

"(3) Whether the system of payments of rental in money, or whether the system of payment of rent in grain, is the proper cist of payment?

"(6) Whether there was a special contract in Fasli 1299 between the parties as to the rates, and what were the terms of the contract and whether such contract is still binding?"

At the trial before the Deputy Collector it was admitted that money-rents at varying rates had been in force in the village since Fasli 1266 (1856,) with the exception of 2 years (Fasli 1285 and 1286—1875 and 1876), when rent in kind was paid under circumstances regarding which the parties are not agreed; that in Fasli 1299 an arrangement was come to by which the varying money-rates prevailing in Chevendra were replaced by a uniform rate of Rs. 5 per acre, and puttahs and muchilikas were exchanged on that basis for a term of 5 years, and that the same arrangement continued for the next four years; that in Fasli 1309 the plaintiff, wishing to revert to the Asara system, tendered to the tenants Asara Puttahs, which they refused to accept on the grounds already stated.

On the 3rd issue, *viz.*, "Whether, money-rent or rent in kind was the proper cist of payment," the Deputy Collector, principally on the fact that the Veesabadi or cash system (as opposed to the Asara) had prevailed in the villages with a short break, over more than 40 years, held that payment in money was "the proper form of payment of rent."

On the question whether the rate of Rs. 5 was in 1889 fixed in perpetuity, he found, for reasons set out in his judgment, "that there was a special contract between the parties to pay and receive at the rate of Rs. 5 an acre as an unchanging rent." He accordingly directed that the puttahs tendered by

the plaintiff should be modified in conformity with his finding and that the defendants should execute muchilkas in accordancet therewith.

On appeal by the plaintiff, the acting District Judge agreed with the first Court that " money-rents alone were the proper mode of payment."

With regard to the question whether the rates settled in 1889 were permanent, he held that the tenants had not succeeded in establishing their allegation. And he added : " The defendants, having failed to prove the express contract that Rs. 5 was agreed upon as the permanent rate, cannot be allowed to put forward the plea of an implied contract to the same effect.

Having found that there has been a contract that the rent has to be paid in money, but that there has been none as to how much it is to be, I hold that under S. 11, cl. (3), of the Rent Recovery Act the plaintiff is entitled to be paid rent according to the established warum of the village ".

In this view, the District Judge remanded the cases to the first Court for the purpose of finding the proper warum rates. In his judgment on remand the Deputy Collector stated that he had already found on the evidence the warum rates in force in the village when the Asara last prevailed there; but as the Asara system ceased many years ago, the warum rates recognised then could not be considered the proper warum rates for the present time.

On the return of the above finding the cases came before another District Judge, who was of opinion that, as money rent had been found to be the proper form of payment and no attempt had been made before him to disturb that finding, the tender of warum puttas was wrong, and that the suits should be dismissed on that ground.

On second appeal by the plaintiff, the learned Judges of the High Court appear to have dealt with the judgments of the lower appellate Court both before and after the remand. In the first place, they held that, "even if it be found that the proper rates were only money rates," the tender of a Warum Putta was no objection to a suit being sustained under the Rent Recovery Act. Dealing with the judgment of the first District

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Judge, they were of opinion that it was not open to the Courts "to imply from the mere circumstance that the rent had been paid in money for a series of years, but at varying rates, an agreement to pay money rent."

On the question of an implied contract to pay a fixed rent of Rs. 5 per acre, they considered the District Judge's finding to be unwarranted by law, and they set it aside and remanded the cases for a fresh finding, with the following observations:—

"The question for determination was having regard to what transpired in Fasli 1299, when the uniform rent of Rs. 5 in respect of the whole of the lands in the village was agreed to instead of the different rates for different lands that obtained before and having regard to the fact that from that time for nine years continuously that rate was paid, whether that rate should be taken as impliedly assented to as the rate to be paid in future, and this was a question to be determined upon the evidence adduced and to which reference is made at length under the issue of express contract in the Judge's judgment. There was no question of presumption, and the circumtance that prior to Fasli 1299 rent was paid at fluctuating rates and sometimes in kind and sometimes in money was quite immaterial with reference to the determination of the said question of implied contract. As to the third and last ground stated by the Judge 'again the defendants having failed to prove the express contract that Rs. 5 was agreed upon as the permanent rate cannot be allowed to put forward the plea of an implied contract to the same effect,' it is difficult to understand why defendants were so precluded. These being all the reasons given for holding that there was no implied contract, the finding must be treated as unwarranted by law."

The matter on remand came before a third District Judge, who found in favour of the implied contract.

On the return of the cases to the High Court, the Second Appeals came on for final hearing on the 26th September, 1904, when the learned Judges accepted the last finding of the lower appellate Court as meaning that the rates settled in 1299 were intended to be permanent. They accordingly reversed the decrees of the Courts below, and directed that the terms of the puttas tendered by the plaintiff should be in conformity with the terms of the puttahs of 1299, subject to certain corrections they had already pointed out in their previous judgment.

Other suits, under S. 9 brought by the plaintiff in 1902, have been disposed of by the High Court in accordance with the above decision; and these consolidated appeals have been preferred by the plaintiff to His Majesty in Council against the several decrees of the High Court.

As the respondents do not appear, the cases have been heard *ex-parte*, and it has hence been necessary to refer at some length to the history of the litigation and the contentions of the parties.

It is clear that in 1299. different rates of rent prevailed in the village of Chevendra; some were higher than Rs. 5, others lower: in that year an uniform rate of Rs. 5 per acre was introduced by mutual agreement between the landlord and tenants, and leases were exchanged on that basis for a term of 5 years. The defendants allage that the plaintiff at that time expressly agreed that the rate of Rs. 5 should be permanent. The Courts in India have disbelieved the story of an express agreement to that effect. An implied contract, however, has been inferred from the fact that rents as the same rate were paid and received for 4 years after the expiration of the term fixed by the leases of 1299.

This circumstance is regarded as explainable only on the hypothesis of an understanding that the rate of Rs. 5 should continue for ever, and as rendering probable the existence of an implied centract.

Their Lordships are unable to concur in that view or to hold that alongside of the express contract embodied in the leases exchanged between the parties there was a collateral implied agreement relating to the fixity of rent. The plaintiff denies any understanding of the kind alleged by the defendants; their explanation as to the reason why such an important arrangement was not reduced into writing or incorporated in the puttas and muchilikas of 1299, is that the plaintiff told them that perpetual leases would require to be stamped; and they therefore rested content with his verbal assurance. The Courts in India do not appear to have placed reliance on this statement, nor are their Lordships prepared to accept it.

However much they regret this protracted litigation, they do not find themselves in a position to decide the cases finally. The theory of an implied contract on which the High Court has

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rested its decrees is, in their Lordships' judgment, untenable; there is thus no decision on the real question between the parties, *viz.*, whether the puttas of Fasli 1309 are such as the plaintiff is entitled to impose on the tenants. S. 11 of Act VIII of 1865 lays down the rules for deciding disputes as to the rates of rent. Cl. (iii) deals with the mode of determining the rate when no contract exists. It being found that there is no express or implied contract, the question must be decided in accordance with the rules contained in Cl. (iii).

Their Lordships are disposed to agree with the High Court in the view that it is not open to Courts to imply, from the mere circumstance that the rent has been paid in money for a series of years, an agreement to pay money-rent. But they see no reason why the fact that money-rent has prevailed in a particular locality for a considerable number of years may not form an element in the consideration of the question of usage.

On the whole their Lordships are of opinion that the judgment and decrees of the High Court should be set aside and the cases sent back in order that they may be remitted to the proper Court to determine in accordance with the provisions of Cl. (iii), S. 11, of the Rent Recovery Act, the rates the plaintiff is entitled to receive, and their Lordships will humbly advise His Majesty accordingly.

In the circumstances their Lordships think the appellant should bear his costs of these appeals. The costs in the lower Courts will be in the discretion of the High Court.

Appellant's Attorney: Mr. *Douglas Grant.*

The respondents did not appear.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present :—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Thakur Anant Singh .. .. Appellant *

v.

Thakur Durga Singh .. .. Respondent.

21st April and 7th May 1910.

Evidence—Custom—Wajib-ul-arzes—Their value in evidence—Instance, evidence of an.

Anant Singh v. Durga Singh

There is no class of evidence that is more likely to vary in value according to circumstances than that of the Wajib-ul-arzes.

[*Muhammad Imam Ali Khan* v. *Sardar Husain Khan*[1] and *Musammat Parbati Kunwar* v. *Rani Chandarpal Kunwar and others*[2] affirmed and followed.]

Held, that where, from internal evidence, it seemed probable that the entries recorded in Wajib-ul-arzes connoted the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom, the appellate Courts in India, in holding that the custom was not proved, properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the custom sought to be established by such entries was proved.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh (May 29th, 1907) reversing those of the Court of the Subordinate Judge of Tahsil of Biswan.

The question for determination on the appeal was whether the appellant had proved the custom set up by him that in the family of the parties to the suit, who were Hindus, there was a custom under which a step-brother had a right to share equally with a brother of the whole blood in the succession of a deceased brother.

The parties to the suit were Ahban Thakurs, and the litigation related to the succession of the estate of one Ratan Singh, who died sonless in 1899, possessed of considerable Zamindari and house property. He was succeeded by his widow, Musammat Moona Kunwar, who took a Hindu widow's estate. On the death of the widow on April 12, 1903, the appellant, who was Ratan Singh's step-brother, claimed to share the estate of the deceased equally with the respondent, who was Ratan Singh's full brother. The revenue authorities allowed the respondent's claim, and mutation of names was effected in his favour.

The appellant thereupon instituted the present suit on January 30, 1906, for a decree for possession, with mesne profits, of half the estate left by Ratan Singh, to which he claimed to be entitiled by virtue of the custom above referred to.

The respondent denied the existence of the alleged family custom, and pleaded that he alone was entitled to succeed Ratan Singh under Hindu law.

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1. (1898) I.L.R. 26 C. 81 (P.C.) 2. (1909) I.L.R. 31 A. 447 (P.C.)

nant Singh v. ırga Singh

The only issue, which was framed, was as follows:—"Is there a valid family custom whereby in the parties' family a step-brother is entitled to succeed along with the real brother of the deceased?"

The appellant's evidence included twenty Wajib-ul-arzes, and the Courts in India drew different conclusions from them. The Subordinate Judge held that the appellant established the custom set up by him and decreed the suit, but the Court of the Judicial Commissioner dismissed the suit, holding that the evidence adduced by the appellant was entirely insufficient to establish the alleged custom. The appellant appealed to His Majesty in Council against the last mentioned decree.

B. Dube, for the appellant:—The succession in this case is governed by the custom set up, and the general law will apply, if that custom is not established; *vide* The Oudh Laws Act (XVIII of 1876), S. 3 (*b*) (1). The evidence consists of certain Wajib-ul-arzes, and the testimony of three surviving members of the family. The Wajib-ul-arzes were prepared under Circular No. 20 of 1863, and are official records:—Parliamentary Oudh Papers for 1869. They are admissible in evidence and prove the custom. The Subordinate Judge, who relied upon *Rani Lekraj Kuar v. Baboo Mahpal Singh*,[1] was right in holding that the custom set up was proved.

The Judicial Commissioners say that in *Maheshar Baksh Singh* v. *Ratan Singh*[2] and *Chandrika Baksh* v. *Muna Kuar*[3]; some Wajib-ul-arzes in evidence in this case had been held to be quite unreliable. But an examination of the reports of these cases shows that the view taken by the Judicial Commissioner is erroneous. As regards the admissibility and value as evidence of Wajib-ul-arzes reference was made to *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[4]; *Muhammed Imam Ali Khan* v. *Sardar Hussain Khan*[5]; *Sheikh Hub Ali* v. *Wazir-un-Nissa*[6]; *Musammat Parbati Kunwar* v. *Chanderpal Kunwar*[7]; *Nandi*

1. (1879) I.L.R. 5 C. 744 (P.C.)
2. (1896) I.L.R. 23 C. 776 (P.C.)
3. (1902) I.L.R. 24 A. 273 (P.C.).
4. (1907) I.L.R. 30 A. 1 (P.C.)
5. (1898) I.L.R. 26 C. 81 (P.C.)
6. (1906) I.L.R. 28 A. 496 (P.C.)
7. (1909) I.L.R. 31 A. 447 (P.C.)

Singh v. *Sita Ram*[1] ; *Musammat Sarwari Begum* v. *Musammat Khatin-un-nissa*[2] ; *Ali Nasir Khan* v. *Manik Chand*[3] ; *Uman Parshad* v. *Gandharp Singh*[4] ; and the Oudh Land Revenue Act (XVII of 1876) S. 17.

Anant Sing v. Durga Sing

De Gruyther, K. C., and *K. Brown*, for the respondent :—The custom set up is in derogation of the ordinary law and must be satisfactorily proved—*Chandrika Baksh* v. *Muna Kuar*[5] and Mayne on *Hindu Law and Usage*, 7th Ed., p. 57.

[*Sir Arthur Wilson* :—The peculiarity of this case is that nobody says that the custom was ever acted upon.]

It is contended on the authority of the Oudh Land-Revenue Act (XVII of 1876) S. 17, that the entries in the Wazib-ul-arzes in this case must be presumed to be a correct record of the existence of the custom, but these Wazib-ul-arzes were prepared long before 1876, and cannot be taken to have been prepared under Act XVII of 1876. The proprietor of the estate could have recorded in the Wazib-ul-arzes anything he pleased—Parliamentary Oudh Papers, 1869. The entries are merely statements made by the proprietors as to the custom, and record only the future wishes of the various proprietors.

[*Lord Macnaghten* :—You do not ask us to disregard them altogether.]

No, my Lord ; but they must be taken at their true value. The Wazib-ul-arzes here do not record a judicial opinion after an inquiry. What is recorded in them is obviously the result of some arrangement amongst the proprietors. These Wazib-ul-arzes are merely the expression of the wishes and views of the members of the family. They are similar to the Wazib-ul-arz held to be concocted in the case of *Uman Parshad* v. *Gandharp Singh*[4]. Cases relied upon by the other side were distinguished. The burden of proof is on the appellant, and the Judicial Commissioners have rightly held that he has failed to discharge it.

1. (1888) I.L.R. 16 C. 677 (P.C.).
2. (1908) 12 Oudh Cases 111.
3. (1902) I.L.R. 25 A. 90 at p.p. 93 and 96.
4. (1887) I.L.R. 15 C. 20 (P.C.).
5. (1902) I.L.R. 24 A. 273 (P.C.).

.nant Singh v. ırga Singh.

Mr. *Dube* replied.

The Judgment of their Lordships was delivered by

Lord Collins.—The question on this appeal is as to the right of a step-brother in a Hindu family to share equally with a brother of the whole blood in the succession of a deceased brother. Ratan Singh died in 1899, leaving certain shares in the Deokalia estate, as well as some house property. He was succeeded by his widow, who died in April, 1903. On her death the appellant, Anant Singh, his step-brother, claimed to be equally entitled with Durga Singh, his sole surviving brother of the whole blood, to share in his succession. His contention was upheld by the Subordinate Judge, but on appeal the learned Judicial Commissioner overruled his decision and held that the succession passed to the brother of the whole blood, the now respondent, alone. The learned Judicial Commissioner, in their Lordships' opinion, gave excellent reasons for refusing to regard the evidence adduced by the plaintiff as sufficient to establish such a special custom in the family as to rebut the ordinary presumption that the Mitakshara Law prevailed. It has been pointed out more than once at this Board that there is no class of evidence that is more likely to vary in value according to circumstances than that of the *Wazib-ul-arzes*—*Muhammad Iman Ali Khan* v *Sardar Hussain Khan*[1] and *Musammat Parbati Kunwar* v. *Rani Chandrapal Kunwar and others*[2]—and where, as here, from internal evidence, it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well established custom, the learned Judicial Commissioner properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed. The question involved was one of fact only, and their Lordships see no reason whatever to differ from the opinion of the learned Judicial Commissioner.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors: Messrs. *Barrow, Rogers and Nevill* for the appellant.

Solicitors: Messrs. *T. L. Wilson & Co.* for the respondent.

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1. (1898) I.L.R. 26 C. 81 (P.C.). 2. (1909) I.L.R. 31 A. 447 (P.C.).

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Thakur Sheoraj Kunwar .. .. Appellant*

v.

Thakur Harihar Bakhsh Singh & another. .Respondents.

The Oudh Laws Act (No. XVIII of 1876) S. 9, Clauses (1) & (2)—Meaning of the term 'Mahal'—Inferior Mahal—Right of pre-emption.

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The word 'Mahal' in the Oudh Laws Act (XVIII of 1876) means any parcel or parcels of land which have been separately assessed to or are held under a separate engagement for the revenue, and for which a separate record of rights has been prepared. Each Mauza or village is, as a general rule, a separate Mahal, but a Mahal may consist of two or more Mauzas or parts of Mauzas or only a portion of one Mauza. Where each village in a Taluq is separately assessed to revenue and the Taluqdar enters into one engagement for the payment of the revenue on all the villages, the whole Taluqa is a Taluqdari Mahal consisting of a number of villages, each of which is separately assessed to revenue and may be regarded as an inferior Mahal.

There is no right of pre-emption under S. 9, Clauses (1) and (2) of the Oudh Laws Act (XVIII of 1876) unless at the date of the sale of the property in respect of which the right of pre-emption is claimed, the claimant of such a right and the vendor of the property are co-sharers in any sub-division of the tenure in which the property in question is comprised or in the whole Mahal, though the claimant and the vendor may have been jointly liable to the Taluqdar for the Government revenue plus *malikana* as the rent of the property sold.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh (August 8, 1906) reversing those of the Court of the Subordinate Judge of Sitapur (January 16, 1905).

The facts of the case are given in the judgment of their Lordships.

The suit was brought by one Ganesh Bakhsh, who was represented on this appeal by his widow Thakurain Sheoraj Kunwar, the appellant, against Harihar Bakhsh, the first respondent, and Gajadhar Bakhsh, who was represented on the appeal by his widow, Thakurain Sridevi Kunwar, the second respondent. The question at issue on the appeal was whether the appellant had a right of pre-emption in regard to three villages and two *pattis* or portions of two other villages. The First Court decreed the appellant's suit for pre-emption ; but the Court of Appeal dismissed the claim in respect of the

*1910, March 4 and May 7.

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three entire villages, and allowed the claim in respect of the *pattis* of the other two villages.

Sir *Robert Finlay*, K. C., and *G. E. A. Ross* for the appellant—referred to the Oudh Laws Act (XVIII of 1876), Ss. 6, 7, 8 and 9; the Oudh Land Revenue Act (XVII of 1876) Ss. 40, 68, 100 and 101; *Thakur Ganesh Bakhsh* v. *Thakur Harihar Bakhsh* [1] which case decided that the under-proprietors in this case were jointly liable to Taluqdar Harihar for rent; THOMASON'S *Directions to Settlement Officers in the N. W. Provinces* (Calcutta 1885), pp. 49, 50 and 51; N. W. P. and Oudh Land-Revenue Act (III of 1901 U. P.) Ss. 4 (4), 4 (14) and 138, which reproduces S 100 of Act XVII of 1876. They then submitted that the appellant was entitled to bring a suit for pre-emption in respect of the properties in suit; that the Appellate Court had misconstrued the provisions of Act XVIII of 1876, that the Appellate Court misunderstood the nature and effect of the joint liability of the under-proprietor to the superior proprietor, and that the same Court erred in holding that the plaintiff and the second defendant had equal right of pre-emption as regards the two pattis, and that the appellant was not precluded from raising the question as regards her right of pre-emption in respect of the two pattis because lots were drawn under Act XVIII of 1876 S. 9.

De Gruyther, K. C., (*S. A. Kyffin* with him), for the 1st respondent—referred to Act XVIII of 1876, Ss. 7 and 9, and submitted that the appellant had no right to pre-empt the villages in suit ; that she had no preferential right to pre-empt the two pattis, and that in any event she was estopped from re-opening the question by her acquiescence in the drawing of lots. As regards what a 'Mahal' is, he submitted that Mr. Chamier's view was right, and referred to the letter of instructions, dated the 4th February, 1856, paras 14 and 16; *Compendium of Oudh Taluqdari Law*, by J. G. W. SYKES, (Calcutta, 1886), p. 14; THOMASON'S *Directions to Revenue Officers in the N. W. Provinces*, (Calcutta, 1885), pp. 1, 22, 35, 50, 235, 238 and 445; Act XVIII of 1876, Ss. 40, 68, 101 and 132. Revenue Settlement in Oudh is carried out under the instructions in the

1. (1904) I. L. R. 26 A. 299 (P. C).

letter of February 4, 1856, and the meaning of 'Mahal' was known long before Act XVIII of 1876 was passed.

Ross replied.

[*Lord Macnaghten* referred to the North Western Provinces Land-Revenue Act (XIX of 1873), S. 3 (1) for the definition of 'Mahal'].

The Judgment of their Lordships was delivered by

Lord Macnaghten :—This appeal is concerned with a claim to pre-emption under the Oudh Laws Act, 1876, in respect of three entire villages and two *pattis* or portions of two other villages forming part of a taluka called Saraura.

By S. 9 of the Act the right of pre-emption, where it exists, is given on the occasion of a sale—

" 1st, to co-sharers of the sub-division (if any) of the tenure in which the property is comprised in order of their relationship to the vendor * * * ;

2ndly, to co-sharers of the whole Mahal in the same order ;

3rdly, to any member of the village community, and

4thly, if the property be an under-proprietary tenure, to the proprietor ;"

and the section adds this proviso :—

" Where two or more persons are equally entitled to such right the person to exercise the same shall be determined by lot."

There were three brothers, sons of one Basti Singh, whose names were Baldeo Bakhsh, Balwant Singh and Uman Parshad. Baldeo Bakhsh died leaving one son, Bisheshar Bakhsh. Balwant died leaving two sons, Sitla Bakhsh, who died childless, and Ganga Bakhsh. Ganga Bakhsh had obtained a *sanad* of Taluka Saraura, but in 1864, on the occasion of the regular settlement, a compromise was made between Ganga Bakhsh, Bisheshar Bakhsh and Uman Parshad, by which one half of the taluka was assigned to Ganga Bakhsh as superior proprietor and the other half to Bisheshar Bakhsh and Uman Parshad in equal shares in under-proprietary right, they paying the Government revenue plus *malikana* at the rate of 10 per cent. to the Talukdar, and being jointly liable to him in respect of the same as rent. Bisheshar Bakhsh died childless and his share devolved on Uman Parshad. Uman Parshad died and his property devolved upon

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Gajadhar, his grandson, and Ganesh Bakhsh, his son. In 1893 a partition was made between Gajadhar and Ganesh Bakhsh under which the property in question in this suit was assigned to Gajadhar. A decree was made in accordance with the partition, and mutation of names was effected accordingly, but no separate engagement was made for payment of the Government revenue in respect of the three entire villages or the two *pattis* assigned to Gajadhar.

On the 13th of September, 1902, Gajadhar sold the property in question to Harihar Baksh who had succeeded his father Ganga Bakhsh as Talukdar of Saraura.

Thereupon Ganesh Bakhsh filed this suit against Harihar who is respondent No. 1 and Gagadhar, who is dead, and is now represented by his widow, respondent No. 2. The claim was for pre-emption in respect of the three villages and the two pattis.

The Subordinate Judge of Sitapur decided in favour of the plaintiff, Ganesh Bakhsh. From that decision Harihar appealed to the Court of the Judicial Commissioner. The appeal was heard in the first instance by Mr. Wells, Additional Judicial Commissioner, and Mr. Chamier, Officiating Judicial Commissioner. The learned judges differed in opinion. And so the appeal was referred to Mr. Evans, First Assistant Judicial Commissioner. Mr. Evans agreed with Mr. Chamier in thinking that the suits ought to be dismissed as regards the three entire villages, and that as regards the two pattis Ganesh Bakhsh and Harihar, as the only other members of the village communities to which the pattis respectively appertained, were equally entitled to the right of pre-emption. The order was that the appeal be allowed and the suits dismissed with costs in both Courts as regards the three entire villages; and the parties were ordered to draw lots as regards the two pattis. This order was dated the 10th of August 1906. A further order was made on the same day declaring that lots having been drawn the right to buy the two pattis was found to lie with the appellant, Harihar. The appeal was therefore allowed as regards the pattis, and the suit was dismissed as regards them also, and the parties were ordered to pay their own costs as regards the pattis, in the Court of Appeal and below.

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Their Lordships are of opinion that the judgment of the Court of the Judicial Commissioner was right. The opinion delivered by Mr. Chamier, with which Mr. Evans was in substantial agreement, deals with the case very fully. It was contended, he said, that Ganesh Bakhsh was entitled to pre-empt under the first, or failing that, the second clause of the section. The learned Judge pointed out that, even if (as was suggested) each of the villages assigned to Uman Parshad were a sub-division of the tenure in which the property is comprised, it could not be said that Ganesh and Gajadhar were the co-sharers in any sub-division. The question whether Ganesh could claim to pre-empt under the second clause was one, he thought, of greater difficulty. The word 'Mahal,' he observes, is not defined in the Act, but he goes on to say :—

"The word is a term of the Revenue Law and as the Oudh Laws Act, 1876, and the Oudh Land Revenue Act were passed on the same day and refer to each other, it is permissible to refer to the latter Act in order to ascertain the meaning of the word 'Mahal' in the Oudh Laws Act."

Then he refers to the case of *Munnu Lal* v. *Maulvi Sayed Muhammad Ismail*[1], and proceeds as follows :—

"Chapter V of the Revenue Act of 1876 shows that the word 'Mahal' means any parcel or parcels of land which have been separately assessed to or are held under a separate engagement for the revenue and for which a separate record of rights has been prepared, and this is the sense in which the word has been used by Revenue and Judicial officers since the first regular settlement of the Province. See Thomason's "Directions to Revenue Officers" which was the guide book of officers engaged in that settlement. Each Mauza or village is, as a general rule, a separate Mahal, but a Mahal may consist of two or more Mauzas or parts of Mauzas, or only a portion of one Mauza. It is clear that the villages assigned to Uman Parshad did not form a separate Mahal in the ordinary sense. The *kabuliyat* of the Taluka in which they are included, a copy of which is on the record, shows that each village in the Taluk was separately assessed to revenue; and that the Talukdar entered into one engagement for the payment of the revenue on all the villages. The whole Taluka is, therefore, what is called in the Act, a Talukdari Mahal, consisting of a large number of villages, each of which is separately assessed to

1. (1904) I.L.R. 26 A. 574 (P.C.)

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revenue and may be regarded as an inferior Mahal [see S. 100 (*a*) of the Revenue Act of 1876]. The plaintiff is certainly not a co-sharer in the Talukdari Mahal, for the Talukdar has no co-sharer. Nor, as I have already pointed out, is the plaintiff a co-sharar in any of the inferior Mahals just referred to of which the Taluk is made up."

Their Lordships think that the meaning which Mr. Chamier has attributed to the term 'Mahal' is the proper meaning of the word in the Oudh Laws Act, 1876, and that although Gajadhar and Ganesh may have been jointly liable to the Talukdar for the Government revenue plus *malikana*, as the rent of the villages and *pattis* assigned to Bisheshar and Uman under the compromise of 1864, Gajadhar and Ganesh were not, at the date of the sale to Harihar, co-sharers in any sub-division of the tenure in which the property in question was comprised or in the whole Mahal.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Solicitors: *Barrow, Rogers and Nevill* for appellant.

Solicitors: *I. L. Wilson* & *Co.* for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH WESTERN PROVINCES, ALLAHABAD.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Nawab Khwaja Muhammad Khan .. Appellant*

v.

Nawab Husaini Begam *alias* Dilbari Begam .. .. Respondent.

Muhammad Khan v. Husaini Begam.

Mahomedan Law—Contract—Marriage settlement—Agreement to pay annuity to bride—Right of a beneficiary not a party to the contract—Liability of the settlor—Time when matrimonial rights and obligations come into existence—Kharch-i-paudan—English pin-money—Construction of the agreement—Issue of misconduct—Judge's finding and opinion.

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* 1910, April 15 & 19 and June 7.

The suit was brought by the plaintiff, a Mahomedan lady, against the defendant, her father-in-law, to recover arrears of a certain allowance, called Kharch-i-paudan, under the terms of an agreement executed by him prior to and in consideration of her marriage with his son, both she and her husband being minors at the time of the execution of the agreement.

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Held, that although the plaintiff was no party to the agreement, she was clearly entitled to proceed in equity to enforce her claim, and that the rule of common law that a person not a party to an agreement could not take advantage of its provisions, was not applicable to the facts and circumstances of the present case, where the agreement executed by the defendant specifically charged immovable property for the allowance, which he bound himself to pay to the plaintiff, who was the only person beneficially entitled under it.

[*Tweddle* v. *Atkinson*[1] referred to and distinguished.]

Held also, that *Kharch-i-paudan*, which literally means "betel-box-expenses," was a personal allowance to the wife customary among Mahomedan families of rank, especially in Upper India, fixed either before or after marriage, and varying according to the means and position of the parties; and that ordinarily it would be received and spent in the conjugal domicile; but the husband had hardly any control over the wife's application of it, either in her adornment or in the consumption of the article from which it derived its name.

Held further, that the pin-money in the English system, though meant for the personal expenses of the wife, was a fund which she might be made to spend during coverture by the intercession and advice and at the instance of the husband, and that no obligation of that nature was attached to the allowance called *Kharch-i-paudan*.

Held, finally, that under the agreement the defendant's liability began with the plaintiff's entry into her husband's home when, under the Mahomedan Law, the respective matrimonial rights and obligations came into existence; and that the plaintiff was entitled to succeed, there being no condition in the agreement that the allowance called *Kharch-i-paudan* should be paid only whilst she was living in her husband's home or that the defendant's liability should cease whatever the circumstances under which she happened to leave it.

[*Husaini Began* v. *Khwaja Muhammad Khan and others*[2] affirmed].

Where a lady's misconduct was in issue, the Subordinate Judge considered that it was not "legally proved." but expressed himself: "Although unchastity is not duly proved, yet I have no hesitation in holding that plaintiff's (lady's) character is not free from suspicion":

Held, that an opinion of that kind was unsatisfactory; that either the allegation of unchastity was established or it was not; and that if the evidence was not sufficient or not reliable, there was an end of the charge, and it was not proper to give expression to what the Judge called "suspicion."

Appeal from a judgment and decree of the High Court at Allahabad, dated 27th November, 1906, reversing those of the Subordinate Judge of Agra, dated the 16th August, 1904.

1. (1861) 1 B. & S. 393. 2. (1906) I. L. R. 29 All. 151.

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The suit was brought in the first Court by the respondent as plaintiff, against the appellant and another, for the recovery of Rs. 15,000, alleged to be due to the plaintiff as arrears of an allowance called Kharch-i-paudan, under an agreement executed by the appellant. The Subordinate Judge dismissed the suit. On appeal the High Court set aside his decree and decreed the claim of the respondent.

The main question for determination on the appeal related to the meaning, effect and validity of the agreement upon which the suit was based.

The agreement, which was dated the 25th October, 1877, and made shortly before the marriage of a minor son of the appellant with the respondent, who was also a minor at the time, was in the following terms:—

"I, Nawab Khwaja Mahammad Khan, son of Maharana Bhagwant Singh, deceased, a rais of Dohlpur, at present residing at Akbarabad, do declare as follows:—

"That the marriage of my minor son, Rustam Ali Khan, with Musammat Husain Begam *alias* Dilbari Begam, minor daughter of Nawab Muhammad Fida Ali Khan, son of Nawab Muhammad Kazim Ali Khan, resident of Moradabad, has been fixed for the 25th Shawwal, 1294 Hijri, corresponding to 2nd November, 1877. I, the executant, therefore, while in a sound state of body and mind and in the enjoyment of my five senses, declare of my own free will and accord that I shall continue to pay Rs. 500 per month in perpetuity to the girl aforesaid for her pocket expenses, &c., from the date of her marriage, *i.e.*, from the date of her reception, out of the income of the entire property in the Agra district and the Jagir in Dholpur State, detailed below. I, the executant, or my heirs, who will be my representatives, shall not at any time have any objection to, or deviate from, the monthly payment of Rs. 500 fixed to be paid in perpetuity for the expenses aforesaid. The whole of the property shall be liable for the money aforesaid. If I, the executant, or my representatives raise any objection to the payment of the money aforesaid in the manner aforesaid, then Musammat Husaini Begam *alias* Dilbari Begam shall have power to recover the said sum of Rs. 500 per month from all the property in the Agra District and Basai, &c., in Dholpur, in whatever way she may like, *i.e.*, by bringing in suit in the Court.

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"As regards any of the properties aforesaid, I, the executant, or my heirs and representatives shall not have power to transfer it by means of sale or gift or in any other way, and if a transfer is made by me, the executant, or my heirs and representatives, it shall be considered invalid and shall not be entertainable by Court. I have, therefore, executed these few presents by way of an agreement in order that it may serve as evidence and be of use at the time of need."

The case for the plaintiff-respondent was that the defendant asked the father of the plaintiff that his son Nawab Rustam Ali Khan, might be married to the plaintiff. The result of the preliminary negotiation was that the agreement of the 25th October, 1877, was executed by the defendant, and the marriage having taken place, the plaintiff left her father's house and came to the house of her husband at Agra on or about the 1st August, 1883. The plaintiff further alleged in the fifth paragraph of her plaint, that the defendant continued to pay Rs. 500 a month for some time, but that between December, 1891, and April, 1901, arrears amounting to Rs. 56,000 accumulated in respect of the payments due to her, for which sum she brought a suit which was compromised. Further arrears occurred thereafter amounting to Rs. 15,000, and the plaintiff, therefore, prayed for a decree for that sum with costs, and for other relief. Musammat Fatima Begam, the second defendant, who did not appear, was made a party to the suit as she was in possession of a part of the property, hypothecated under the agreement.

In reply to the claim of the plaintiff, the first defendant, the appellant pleaded that the agreement was illegal and without consideration and opposed to public policy; and, further, that the plaintiff had forfeited her rights under the agreement (if any), as she had ceased to live with her husband and had become an unchaste woman.

The Subordinate Judge, on these pleadings framed the following issues for trial:—

(1) Does the plaintiff not live with her husband on account of enmity (*mukhalfat*), or because the latter did not send for her, and how is the deed of agreement affected in the former case?

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(2) Has the plantiff become unchaste, and if so, how does her unchastity affect the agreement?

(3) Is the agreement legally enforcible and is it without consideration ?

(4) Over what property, if any, has the planitiff a hypothecation lien under the deed of agreement?

(5) Are the facts connected with the application of compromise, dated the 2nd May 1902, correct, and in either case how does the compromise affect this suit ?

On the 16th August, 1904, the Subordinate Judge delivered his judgment and decree, by which he dismissed the suit with costs. On the first issue he found as a fact, that it was abundantly proved that the plaintiff had discontinued living with her husband on account of enmity (*mukhalfat*), and not because she was not called by him or requested to live with him. With reference to the 2nd issue he held that " although plaintff's unchastity is not duly proved, yet she is living in a mode which shows that her character is not free from suspicion." Dealing with the 3rd issue, and after commenting on the phraseology of the agreement, the Subordinate Judge observed : " The most vital question for determination now, is whether the Court is justified in enforcing the agreement even when the plaintiff refuses to live with her husband. The agreement does not impose any condition except the one mentioned below, on the fulfilment of which the plaintiff would be entitled to the allowance. No period is fixed during which the allowance was to be paid. It is to be paid in perpetuity. The only condition is that she should go to her husband's house. This, she says, she has complied with. But when this agreement was executed both the husband and wife were minors. It is unreasonable to suppose that she can enforce her contract against her father-in law, even when she refuses to live with her husband. Her visiting her husband's house was insisted on when she was a minor, as a condition necessary to entitle her to the benefit of contract, and how can it reasonably be inferred that after attaining majority she will be entitled to her allowance even in case of her refusal to live with her husband ? To hold so would be repulsive to conscience and common sense. I hold that if the plaintiff prove unchaste or refuse to live with her

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husband, there is no obligation on her father-in-law (the defendant) to pay her any allowance. Her witness, Shams-ud-din, deposes that Rustam Ali Khan has kept a woman and has incurred debts, but these do not justify her to refuse to live with her husband. In the present case unchastity has not been legally proved, but her refusal to live with her husband is most satisfactorily proved, and I, therefore, hold that she is not entitled to her allowanee."

The plaintiff, the respondent, appealed to the High Court at Allahabad from the decree of the Subordinate Judge. The appeal was heard by a Divisional Court, constituted by the *Chief Justice* and Mr. Justice *Burkitt*, who, on the 27th November 1906, delivered their judgment, by which they allowed the appeal, and gave a decree to the plaintiff for the sum of Rs. 15,000, interest at the rate of 6 per cent. per annum, from the 10th of November, 1903, up to the date of payment, with costs They also declared that the annuity was well charged upon the property mentioned in the plaint, and specified in detail in the agreement so far as that property was situate in British India. The learned Judges held that the plaintiff was entitled to take advantage of the provisions of the agreement, which was solely executed for her benefit, although she was no party to it, and were of opinion that the fact that the plaintiff refused to live with her husband did not relieve the defendant Nawab Khwaja Muhammad Khan from "his obligation to satisfy his undertaking." For a full report of the judgment see *Husain Begam* v. *Khwaja Muhammad Khan and others*[1].

The defendant-appellant, thereupon, appealed to his Majesty in Council.

Cave, K. C., and *G. E. A. Ross* for the appellant:—The plaintiff was not a party to the agreement and could not sue the defendant-appellant on it: she could not derive any advantage under it—*Tweddle* v. *Atkinson*[2]. The money was settled upon the plaintiff to enable her to perform her duties as a wife, who is bound to live in her husband's house. The plaintiff, however, left her husband and refused to go back to him. She is, therefore, not entitled to the allowance, which is

1. (1906) I.L.R. 29, A. 151. 2. (1861) 1 B. and S. 393.

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in its nature analogous to the English pin-money. They referred to *Jodrell* v. *Jodrell*[1]; *Howard* v. '*Digby*[2]; Digest of Anglo Muhammadan Law' by Sir R. K. Wilson, 3rd Ed., pp. 123, 125 and 133; and 'A Glossary of Indian Terms', by H. H. Wilson, for the meaning of the word '*paudan*.'

DeGruyther, K. C., and *H. Cowell*, for the respondent were not heard.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali:—The suit which has given rise to this appeal was brought by the plaintiff, a Muhammadan lady, against the defendant, her father-in-law, to recover arrears of certain allowance, called *Kharch-i paudan*, under the terms of an agreement executed by him on the 25th October 1877, prior to and in consideration of her marriage with his son Rustam Ali Khan, both she and her future husband being minors at the time.

The agreement in question recites that the marriage was fixed for the 2nd November 1877, and that "therefore" the defendant declared of his own free will and accord that he "shall continue to pay Rs. 500 per month in perpetuity" to the plaintiff for "her betel-leaf expenses, etc., from the date of the marriage, *i.e.*, from the date of her reception," out of the income of certain properties therein specifically described, which he then proceeded to charge for the payment of the allowance.

Owing to the minority of the plaintiff, her "reception" into the conjugal domicile to which reference is made in the agreement does not appear to have taken place until 1883. The husband and wife lived together until 1896, when, owing to differences, she left her husband's home, and has since resided more or less continuously at Moradabad.

The defendant admitted the execution of the document on which the suit is brought, but disclaimed liability principally on two grounds, *viz.*, (1) that the plaintiff was no party to the agreement, and was consequently not entitled to maintain the action, and (2) that she had forfeited her right to the allowance thereunder by her misconduct and refusal to live with her husband.

1. (1815) 9 Beav. 45. 2. (1834) 2 Cl. and F. 653 at pp. 653, 654.

Muhammad Khan v. Husaini Begam.

Evidence of a sort was produced to establish the allegations of misconduct, but the Subordinate Judge considered that it was not "legally proved." In another place he expresses himself thus: "Although unchastity is not duly proved, yet I have no hesitation in holding that plaintiff's character is not free from suspicion." Their Lordships cannot help considering an opinion of this kind regarding a serious charge as unsatisfactory. Either the allegation of unchastity was established or it was not; if the evidence was not sufficient or not reliable there was an end of the charge so far as the particular matter in issue was concerned, and it was hardly proper to give expression to what the Judge calls "suspicion."

The Subordinate Judge, however, came to the conclusion that the plaintiff's refusal to live with her husband was satisfactorily proved, and, holding that on that ground she was not entitled to the allowance, he dismissed the suit.

The plaintiff thereupon appealed to the High Court, where the argument seems to have been confined solely to the question of the plaintiff's right to maintain the action, as the learned Judges observe that neither side called their attention to the evidence on the record. They hold that she had a clear right to sue under the agreement, and they accordingly reversed the order of the first Court and decreed the plaintiff's claim.

The defendant had appealed to His Majesty in Council, and two main objections have been urged on his behalf to the judgment and decree of the High Court.

First, it is contended, on the authority of *Tweddle* v. *Atkinson*[1] that as the plaintiff was no party to the agreement, she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied upon was an action of *assumpsit*, and that the rule of Common Law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immoveable property for the allowance which he binds himself to pay to the plaintiff; she is the only person

1. (1861) 1 B. & S. 398.

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beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim.

Their Lordships desire to observe that in India and among communities circumstanced as Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common Law doctrine was applied to agreements or arrangements entered into in conection with such contracts.

It has, however, been urged with some force that the allowance for which the defendant made himself liable signifies money paid to a wife when she lives with her husband, that it is analogous in its nature to the English pin-money, over the application of which the husband has a control, and that, as the plaintiff has left her husband's home and refused to live with him, she has forfeited her right to it.

Kharch-i-paudan, which literally means "betel-box expense," is a personal allowance, as their Lordships understand, to the wife customary among Mahomedan families of rank, especially in Upper India, fixed either before or after the marriage, and varying according to the means and position of the parties. When they are minors, as is frequently the case, the arrangement is made between the respective parents and guardians. Although there is some analogy between this allowance and the pin-money in the English system, it appears to stand on a different legal footing arising from difference in social institutions. Pin-money, though meant for the personal expenses of the wife, has been described as "a fund which she may be made to spend during the coverture by the intercession and advice and at the instance of the husband."

Their Lordships are not aware that any obligation of that nature is attached to the allowance called ***kharch-i-paudan.*** Ordinarily, of course, the money would be received and spent in the conjugal domicile, but the husband has hardly any control over the wife's application of the allowance, either in her adornment or in the consumption of the article from which it derives its name.

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By the agreement on which the present suit is based the defendant binds himself unreservedly pay to the plaintiff the fixed allowance; there is no condition that it should be paid only whilst the wife is living in the husband's home, or that his liability should cease whatever the circumstances under which she happens to leave it.

The only condition relates to the time when, and the circumstances under which, his liability would begin. That is fixed with her first entry into her husband's home when, under the Mahomedan Law, the respective matrimonial rights and obligations come into existence. The reason that no other reservation was made at the time is obvious. The plaintiff was closely related to the ruler of the Native State of Rampur; and the defendant executed the agreement in order to make a suitable provision for a lady of her position. The contingency that has since arisen could not have been contemplated by the defendant.

The plaintiff herself was examined as a witness for the defence. She states in her evidence that she has frequently been visited by her husband since she left his home. Neither he nor the defendant has come forward to contradict her statements. Nor does any step appear to have been taken on the husband's part to sue for restitution of conjugal rights, which the civil law of India permits. On the whole their Lordships are of opinion that the judgment and decree of the High Court are correct and ought to be affirmed.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be dismissed.

The appellant will pay the costs.

Solicitors: *Barrow, Rogers and Nevill* for the appellant.

Solicitors: *Rankenford, Ford and Chester* for the respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT CALCUTTA.]

Present :—Lord Macnaghten, Lord Collins and Sir Arthur Wilson.

Mohant Damodar Das .. .. Appellant*

v.

Adhikari Lakhan Das .. .. Respondent.

Damodar Das v. Lakhan Das.

Limitation—Adverse Possession—Religious Endowment—Suit to recover possession—Property of the idol—Mohant—Senior and Junior Chelas—Disputed right of succession—Ekrarnamah embodying terms of settlement—Construction—Respective rights of the two chelas.

The plaintiff, as Mohant of the Mutt or Temple of a Hindu Deity at Bhadrak, sued, on the 17th July, 1901, to recover possession of certain properties situate at Bibisarai, alleging that the properties were debottar property, dedicated to the worship and service of the plaintiff's Thakur, and held by the defendant as an Adhikari in charge of a subordinate Mutt at Bibisarai. A controversy, which arose on the death of a former Mahant, who died leaving two Chelas, as to the right of succession to the two Mutts and the property annexed to them, was settled by an arrangement embodied in an Ekrarnama, dated the 3rd November, 1874, executed by the senior Chela in favour of the junior Chela, described as Adhikari, by which the Mutt at Bhadrak, was allotted in perpetuity to the elder Chela and his successors, while the Mutt at Bibisarai and the properties annexed to it, were allotted to the younger Chela and his successors, for the purposes connected with his Mutt, subject to a small annual payment towards the expenses of the Bhadrak Mutt The parties to the suit stood in the place of the elder and younger Chelas respectively :

Held (affirming the decision of the High Court) that in point of law, the property dealt with by the Ekrarnama was, prior to its date to be regarded as vested not in the Mohant but in the legal entity, the Idol, the Mahant being only his representative and Manager ; that from the date of the Ekrarnama the possession of the junior Chela, by virtue of the terms of that Ekrarnama, was adverse to the right of the Idol and of the senior Chela, as representing that Idol ; and that the suit was barred by limitation.

Appeal, which was heard *ex parte*, against a decree of the High Court at Calcutta, dated the 6th June, 1905, in an appeal from a decree of the Subordinate Judge of Cuttack, dated the 30th September, 1902.

By the last mentioned decree, in the Court of first instance, the plaintiff's suit was decreed.

By the decree of the High Court the said decree was reversed on appeal, and the plaintiff's suit dismissed.

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* 1910, March 2 and June 7.

The suit was filed on the 17th July, 1901, in the Court of the Subordinate Judge of Cuttack, by the plaintiff-appellant, as the Mohant and Shebait of the Sadabrata Math, or Temple of the Thakur Sri Gopal Jiu at Bhadrak, in the District of Balasore, for the recovery of possession from the defendant of certain properties, movable and immovable, set forth in the schedule to the plaint.

The property in question is situate at Bibisarai, in Pergunnah Jajpur, and was alleged by the plaintiff to be part of the *debottar* and *marfatdari* property of, and as such, dedicated to and required for the purposes of the worship and service of, the said Thakur above mentioned.

It was further alleged by the plaintiff that his predecessor, Mohant and Shebait of the said Thakur and Math at Bhadrak, Sri Ram Das, on succeeding to the office of Mohant, had in the course of a dispute and litigation with the defendant, who claimed to be the successor to the said office, at the instance of mutual friends, entered into an agreement with the defendant, whereby the said properties at Bibiserai were to be held by the defendant as an Adhikari, or Manager, for purposes set forth in the Ekrarnamahs, which were executed by the said parties on the 3rd November, 1874, and subordinate to the said Bhadrak Math.

The plaintiff's case was that the property in dispute, being a part of the debottar property of the said Thakur, could not be validly assigned or dealt with by the said Mohant, Sri Ram Das, so as to affect the right of the said Thakur, and that in any event no such arrangement could be operative beyond the lifetime of the said Sri Ram Das, and that upon his death the said Ekrarnamah and the arrangements thereunder lapsed and became ineffective.

The plaintiff also alleged that the defendant was unfit for the post of an Adhikari, and that owing to his habit of misappropriating the profits of the said debottar properties he was not fitted to be in possession of them.

The plaintiff alleged his cause of action to have accrued upon the death of his said Guru and predecessor, Mahant Sri Ram Das, on the 5th Sraban, 1296, corresponding with the 18th July 1889.

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The plaintiff prayed, *inter alia*, for a declaration that the disputed property was the debottar property of the said Thakur Sri Gopal Jiu of the Sadabrata Math at Bhadrak, that the said Ekararnamah was illegal and invalid, and for possession of the said property with mesne profits.

The defendant in his written statement set up limitation as his defence, claiming that neither the plaintiff nor his predecessor had been in possession of the disputed property within twelve years prior to the institution of the suit. He stated that he had been in adverse possession of the properties in the suit from the 3rd November, 1874, the date of the said Ekararnamah, and that an absolute right had accrued to him in respect of the disputed properties, and that the alleged rights of the plaintiff and his predecessor, Mohant Sri Ram Das, had become extinct.

The following were the terms of the settlement embodied in the Ekararnamah, dated the 3rd November, 1874.

"1st—Subordinate to this Math (at Bhadrak) there is within the areas of Mouzas Bibisarai and Dasabatar in Pergunnah Jajpur a Math known as Bibisarai Math. On the death of Mohant Narayan Das, the founder of the Math at Bhadrak, his elder child (disciple), Ram Ratan Das, became the Mohant, and the younger child, Pursotum Das, founded the Math at Bibisarai, and acquired some lands as debottar of the said Thakur of the Bhadrak Math, and set up as substitutes of the said Thakurs, the images of the Thakurs Gobind Jiu and Bala Jiu, and remained in possession and occupation of the Sheba Puja of the said Thakurs. On his death, Ganga Ram Das, the younger disciple of the said Ram Ratan Das, and co-disciple of my Guru's Guru, Mohant Narayan Das, remained in possession as appointed by Pursotum Das. On his death, his disciple Mohan Das, having preferred a claim in his own right, his possession was put a stop to under a decision of the Civil Court, and the said Math has been held in possession as subordinate to the Math at Bhadrak. Henceforth Lakhan Das, aforesaid, shall, under the title of Adhikari, remain in possession and enjoyment of the said Math as subordinate to the Bhadrak Math, and of the undermentioned 351 mans 10 gunts and 5 biswas of released and resumed lands appertaining thereto in the same

manner as the younger disciples of the former Mohant held and enjoyed the said Math, and shall continue to perform the Sheba Puja and Janijatra (festivals) of the said Thakur Gopal Jiu and Bala Jiu established in the said Math.

"2nd.—I and my heirs shall have no right to remove Adhikari Lakhan Das and his heirs from the possession of the said Math and the lands appertaining thereto and subordinate to the Bhadrak Math; and the said Adhikari shall not be competent to exercise his own authority, and he shall not be able in any way to transfer to any one the said Math and the lands appertaining thereto.

"3rd.—That in order to show the subordinateness of the said Bibisarai Math to the Math of Bhadrak, the said Adhikari shall, as a token of respect, pay annually a sum of Rs. 15 for the expenses of the Thakur at the Bhadrak Math, and if he neglects to pay this money and allows it to fall into arrears, then I and my heirs shall bring some lands under attachment and collection of the Bhadrak Math, a portion of the lands appertaining to the said Math sufficient for the realization of the arrears; and after realising the arrears restore the land to his possession. If there be any business or a litigation in connection with the Math at Bhadrak, the said Adhikari shall, according to my direction, be present on the occasion, and shall appear at the Math or at any other darbar or before any officer and manage the business."

The issues material for the purpose of this report were decided as follows:—

The Subordinate Judge found as to the 2nd issue that Mohant Sri Ram Das died on the 19th July 1889, and that, therefore, the plaintiff's suit was not barred by limitation. As to the 3rd issue he found that the defendant had obtained possession under the said *Ekrarnamah*; that the onus lay upon him to show how and when that possession became adverse to the Mohant of the Bhadrak Math, and that there was no evidence of adverse possession. He gave the plaintiff a decree for possession of the disputed properties with mesne profits from the date of the suit, and with costs.

The defendant appealed to the High Court when the plaintiff's suit was dismissed with costs on the ground that the defendant's

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possession of the said properties had been adverse. The judgment of the High Court on this part of the case was as follows:—

"Now, if the plaintiff claims to be the successor of Sri Ram Das, he certainly cannot recover the Bibisarai Math, for the *Ekrarnama* provides that neither Sri Ram Das nor any of his heirs shall ever disturb the possession of the defendant in the Bibisarai Math. On the other hand, if the plaintiff sues merely as the trustee of the idol, to whom the two Maths in strict legal intendment belong, he is met by the plea of the defendant's adverse possession of 27 years. We think there can be no doubt that the defendant held the disputed Math adversely for more than 12 years even before the death of Sri Ram Das. This is apparent from Exs. 10, 11 and 12, in which the Defendant claimed in February, 1877, to hold the Math by right of inheritance, though he admitted that possession was made over to him under the *Ekrarnama* of 1874. Sri Ram Das died in July, 1899, more than 12 years after the above claim. Furthermore, it would appear from the Privy Council decision in the case of *Gnana Sambanda Pandara Sannidhi* v. *Velu Pandaram*[1] that the plaintiff and his preceding Shebaits are not in the position of the holders of life estates, and that the plaintiff is not entitled to contend that his right to sue accrued to him only on the death of Sri Ram Das, and that the possession of the defendant which may have been adverse to Sri Ram Das, was not adverse to him. The decision of the Privy Council above alluded to is of higher authority than the ruling of this Court in *Aruth Misser* v. *Juggernath*,[2] on which the Subordinate Judge relies.

Moreover, this Court in a comparatively recent case, *Nilmoni Singh* v. *Jagabandhu Roy*,[3] has affirmed the principle laid down by their Lordships of the Privy Council, in the decision above referred to, and has held that each succeeding manager or Shebait of an idol does not get a fresh start, as far as the question of limitation is concerned, on the ground of his not deriving title from any previous Manager. The ruling in this case is further direct authority for holding that the possession of the defendant has been all along adverse, and bars the plaintiff's claim, and the decision in *Bijoy Chandra Banerji* v. *Kali Prasanna Mukerji*,[4] also supports this view.

1. (1899) I.L.R. 23 M. 271.
2. (1872) 18 W.R. 439.
3. (1896) I.L.R. 23 C. 536.
4. (1878) I.L.R. 4 C. 327.

The plaintiff, thereupon, appealed to His Majesty in Council.

A. M. Dunne, for the appellant, contended that the title of the Thakur of the Math at Bhadrak, as proprietor of the property in suit, was clearly established by the evidence, and submitted that the terms of the *Ekrarnama* did not confer upon the respondent any rights beyond those of a manager and agent of the properties belonging to the Bhadrak Thakur, and subordinate to the Mohant of the Bhadrak Math. He further contended that any rights granted to the respondent and his possession under the *Ekrarnama* could not and did not endure beyond the lifetime of the Mohant Sri Ram Das. He distinguished *Gnana Sambandha Pandara Sannadhi* v. *Velu Pandaram*[1], and *Nilmony Singh* v. *Jagabandhu Roy*[2], and further submitted that no evidence was adduced which showed any adverse possession by the respondent, or which could confer any statutory title upon him in regard to the property in suit.

The respondent did not appear.

The judgment of their Lordships was delivered by

Sir Arthur Wilson:—This is an appeal from a decision of the High Court at Calcutta of the 6th June 1905, which overruled that of the Subordinate Judge of Cuttack of the 30th September 1902.

The suit out of which the appeal arises, was filed in the last mentioned Court, by the plaintiff-appellant in his character as Mohant of the Math or temple of a Hindu deity at Bhadrak in Balasore and the object of the suit was to recover possession of certain properties situate at Bibisarai in Jajpur, the suit being based on the allegation that the properties were debottar properties, dedicated to the worship and service of plaintiff's Thakur, and held by the defendant as an Adhikari in charge of what was said to be a subordinate Math of Bibisarai.

The first Court decided in favour of the plaintiff. That decision was reversed on appeal by the High Court on the ground that the plaintiff's suit was barred by limitation. Their Lordships are of opinion that the learned Judges of the High Court were right.

There is now no dispute as to any question strictly of fact. The former Mohant was in possession of both Maths and of the

1. (1899) I.L.R. 23 M. 271. 2. (1896) I.L.R. 23 C. 536.

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property annexed to them. He died leaving two Chelas, between whom a controversy arose as to the right of succession to the Maths and the property annexed to them. That controversy was settled by an arrangement embodied for the present purpose in an *Ekrarnama* of the 3rd November 1874, executed by Sri Ram Das, senior Chela in favour of the junior Chela, described as Adhikari Lakhan Das, by which the Math at Bhadrak was allotted in perpetuity to the elder Chela and his successors, while the Math at Bibisarai, and the properties annexed to it, were allotted to the younger Chela and his successors for the purposes connected with his Math, subject to an annual payment of Rs. 15 towards the expenses of the Bhadrak Math. The parties to the present suit stand in the place of the elder and younger Chelas respectively.

The learned judges of the High Court have rightly held that in point of law, the property dealt with by the *Ekrarnama* was, prior to its date, to be regarded as vested not in the Mohant but in the legal entity, the Idol, the Mohant being only his representative and manager. And it follows from this that the learned judges were further right in holding that from the date of the *Ekrarnama* the possession of the junior Chela, by virtue of the terms of that *Ekrarnama*, was adverse to the right of the Idol and of the senior Chela, as representing that Idol, and that the present suit was barred by limitation.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the respondent has not appeared upon the hearing of the appeal there will be no order as to costs.

Solicitors for the appellant: *T. L. Wilson & Co.*

The respondent did not appear.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Kasim Ahmed Jewa .. Appellant.*

v.

Narain Chetty and others .. Respondents.

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* 1910, March 8 & 9.

Privy Council Practice—Dismissal of appeal—Amendment of the decree under appeal—Absence of petition of appeal by the respondents.

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Their Lordships dismissed the appeal, but amended the decree appealed against by providing for interest subsequent to the decree in accordance with the prayer in the petition for special leave to appeal presented by the respondents, who did not lodge their petition of appeal as required under the Judicial Committee Rules, 1908.

This was an appeal from a decree of the Chief Court of Lower Burma on its appellate side dated the 21st of May, 1906, varying the decree of the same Court on its Original side dated the 30th of June, 1905.

This case is reported only on a point of practice, *viz.*, the amendment of the decree appealed against in the absence of a petition of appeal by way of a cross-appeal, when the appeal is dismissed.

The suit was brought on August 19, 1904, by the respondents to recover principal and interest, amounting to Rs.16,042½ on a promissory note for Rs. 15,000 dated the 22nd January, 1904, and executed by the appellant and his brother Hashim, who did not defend the suit. The plaint included a prayer for interest on the amount of the promissory note from the date of the institution of the suit until the date of the decree and thereafter on the decretal amount until realization and for costs. The first Court held that the promissory note had been satisfied to the extent of Rs. 14,400 by the specific appropriation of sums to that amount, and made a decree whereby the defendants were ordered to pay the plaintiffs Rs. 500 with interest thereon from the date of the institution of the suit until realization together with costs on that amount. The appellate Court reversed the finding on the first Court and made a decree for the full amount claimed, Rs. 16042-8-0, with costs in both Courts.

On November 25, 1906, the appellant applied to the appellate Court for leave to appeal to His Majesty in Council, but leave was refused on the ground that the application was barred by Article 177 of the Second Schedule to the Indian Limitation Act. The appellant, thereupon, applied to His Majesty in Council for special leave to appeal, which was granted on the 26th March, 1907.

On April 25, 1907, the respondents applied to the appellate Court to amend its decree by setting out specifically that interest

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was payable on the decretal amount, but that application was dismissed on July 15th 1907. On March 2, 1910, the respondents obtained special leave to appeal with a view to get the decree of the appellate Court amended by providing for interest subsequent to the date of the decree. No petition of appeal as required by the Judicial Committee Rules, 1908, was lodged by the respondents.

J. Roskill, K. C., and *J. McCarthy*, for the appellant.

De Gruyther, K. C., and *E. U. Ediss*, for the respondents, referred to the Indian Contract Act (IX of 1872), S. 59, and the Indian Evidence Act (I of 1872), S. 34.

The Judgment of their Lordships was delivered by

Lord Macnaghten:—This is a pure question of fact. Their Lordships see no reason to disturb the judgment of the Court from which the appeal is brought.

It does not appear to their Lordships necessary to go into the affirmative case made by Mr. De Gruyther. It is enough to say that in their Lordships' opinion the judgment of the Chief Court of Lower Burma is right and their Lordships agree with it for the reasons which they have given, and which it is not necessary for their Lordships to repeat.

With reference to the two clerks, their evidence is not sufficient to support the defendant's case. The evdidence is extremely weak. They say it is customary to endorse on a promissory note the payments made on account. There is no endorsement on the promissory note, and there is no corroboration of their statement which is positively denied on the other side.

Their Lordships will therefore humbly advise His Majesty that the appeal must be dismissed.

The appellant will pay the costs of the appeal.

The Judgment of the Chief Court will be amended by the providing for interest subsequent to the decree in accordance with the prayer of the petition presented by the respondents.

Solicitors for appellant: *Bramall and White.*

Solicitors for respondents: *Sanderson, Adkin, Lee and Eddis.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir R. S. Benson, Offg. Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Subramania Aiyar .. Appellant* (*Plaintiff*)

v.

Gopala Aiyar and others .. Respondents (*Defendants*).

Subramania Aiyar v. Gopala Aiyar.

Limitation Act (*XV of* 1877) *Art.* 36, 98—"*General Estate*"—*Joint family property of Hindu father after his death not general estate—Principal and surety—Forbearance to sue—Principal—Debt barred against principal—Surety yet liable—Contract Act*, *S.* 134.

The joint family property of a Hindu father and his sons which has passed by survivorship to the sons on the father's death, is not "the general estate" of the deceased father within the meaning of Art. 98 of the Limitation Act.

A suit barred against the father by Art. 36 of the Limitation Act is barred against the sons as well.

Whenever personal actions are barred, the rights themselves are not extinguished

A mere forbearance to sue the principal and allowing the right of action against him to be barred by limitation do not discharge the surety.

Second appeal from the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 1234 of 1905 preferred against the decree of the Court of the District Munsif of Tiruturaipundi in O. S. No. 136 of 1904.

This is a suit to recover from the sons, and from the sureties, of deceased trustee of a temple the loss occasioned by his mismanagement (non-collection of rents). Defendants 1 to 3 are the sons, and of the other defendants some are sureties and others are sons of sureties. The properties, a sale of which was prayed for in the plaint were hypothecated by the sureties for the due discharge of the trustee's duties. The trustee died on 24th July 1901. The suit was filed on 29th July 1904.

The sons of the trustee contended that, as the suit was filed more than three years from the date of the death of the trustee, the suit was barred by limitation. The other defendants contended that as the liability of the trustee was allowed to be barred, their liability as sureties was also discharged.

Upholding the respective defences, the suit was dismissed by both the lower Courts. The first Court held that the article of the Limitation Act applicable against the trustee's sons was

*S. A. 581 of 1906. 26th October 1909.

Subramania Aiyar v. Gopala Aiyar.

either 83 or 115; but the appellate Court held that Article 98 applied and not Article 120.

The plaintiff appealed.

G. S. Ramachandra Aiyar for appellant.

T. R. Venkatrama Sastri for respondent.

G. S. Ramachandra Aiyar.—The Article applicable against the sons is Article 120. Article 98 applies only if the suit is against the general estate of the *deceased* in the hands of the sons. As the sons got the property by survivorship Article 98 does not apply. Even if the suit is barred as against the sons, the liability of the surety is not discharged. For the liability of the surety, see Ss. 134 and 137 of the Contract Act. Section 137 says that the discharge of the debtor by any act or omission of the creditor discharges also the surety. If the creditor allows the recovery of the debt to become *barred* as against the debtor it does not *discharge* the debt; for a bar by limitation bars only the remedy by suit and does not extinguish the debt. Cf. S. 28 of the Limitation Act; also cf. Ss. 25 and 60 of the Contract Act; MITRA'S *Limitation*, p. 15. The Bombay and Calcutta High Courts construe S. 137 as a qualification of S. 134 and therefore hold that mere forbearance to sue the debtor for the statutory period does not extinguish the liability—*Hajarmal* v. *Krishnarav*[1], *Krishto Kishori Chowdrain* v. *Radha Mohen*[2]. *Ranjit Singh* v. *Naubet*[3] is in conflict with these, and I submit it is wrong. Even under English law the surety is not discharged under such circumstances.—DECOLLEYER, p. 438; *Carter* v. *White.*[4]

T. R. Venkataramа Sastri.—Article 36 applies as against the sons and not Article 120, for the act of the father (trustee) amounted to malfeasance or misfeasance. And the cause of action against the sons arose at the same time as against the father. If it is barred against the father it is barred against the sons also. The Vakil then referred to *Ranga Pai* v. *Baba*[5] and *Periasami* v. *Seetharama.*[6] If the debt is barred as against the debtor it is also barred as against the surety. *Ranjit Singh* v.

1. (1881) I.L.R. 5 B. 647.
2. (1885) I.L.R. 12 C. 330.
3. (1902) I.L.R. 24 A. 504.
4. (1883) 25 Ch. D. 666.
5. (1897) I.L.R. 20 M. 398.
6. (1903) I.L.R. 27 M. 243, 252, 253.

Naubet[1] is good law. The fact that the illustration to S. 137 restricts the time for one year suggests that the mere forbearance referred to in the section should not be for the statutory period, if the debt is to be alive as against the surety.

G. S. Ramachandra Aiyar in reply.—If the Article applicable be one and the same for the father and the son, then there is no necessity for a separate Article 98. An illustration cannot control the clear meaning of the section, and the illustration referred to is only in S. 137 and not in S. 134.

The Court delivered the following

JUDGMENT :—The suit was instituted by the plaintiff as trustee of a temple for recovery of a certain sum of money which represented the rents due to the temple uncollected by the father of the defendants, Nos. 1, 2 and 3, who was the preceding trustee.

The father having died in August-September 1901, the sons were impleaded as liable as well as the representatives of certain sureties for the proper management of the temple affairs by the father. The suit has been dismissed as barred by limitation. As regards the sons, Article 98 of the Indian Limitation Act XV of 1877 is sought to be made applicable. It runs as follows:—

" To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust."

The property that is sought to be made liable being the joint family property of the father and sons, which passes by survivorship to the sons on the death of the father, we do not think it forms "the general estate" of the deceased trustee within the meaning of the article. The sons are sued on the ground of the peculiar liability of the sons under the Hindu Law to pay the father's debts. It is unnecessary to determine which Article applies in the case of a suit to enforce the liability of the sons to pay the debts of the father. (See however, *Periaswami Mudalliar* v. *Seetharama Chettiar*[2].) For, the sons are clearly not liable to pay a debt of the father which was barred against him. The suit is based on the ground that the rents were lost to the temple because the

1. (1902) I.L.R. 24 A. 504. 2. (1903) I. L. R. 27 M. 243 at p. 252.

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father had allowed them to be barred ; otherwise there would be no liability at all of the father, or his sons. The suit against the father being barred under Article 36 of the Indian Limitation Act XV of 1877 (see *Srinivasa Ayyangar* v. *Municipal Council of Karur*[1]) no suit can lie against the sons.

The next question is—are the sureties liable ? The determination of this question depends upon the construction of S. 134 and S. 137 of the Indian Contract Act IX of 1872. Section 134 says : "The surety is discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor." Does the omission of the creditor to sue the principal debtor within the statutory period discharge the surety. We think not. Says Lindley, L. J. in *Carter* v. *White*[2] : "Is it the law that a creditor who neglects to sue his debtor till the statute has run will thereby discharge his surety ? There is no decision to that effect. On the contrary the true principle is that mere omission to sue does not discharge the surety, because the surety can himself set the law in operation against the debtor. *Cotton* L. J. expressed himself to the same effect, and *Fry*, L. J. concurred. This statement of the law has been accepted without question. See *Chitty* on *Contracts*, p. 465, 14th Edition, and *Darby* and *Bosanquet* on *Limitation*, 2nd Edition, p. 17. Does the Law in India make any difference on this question ? Does the running of the statutory period of time extinguish the debt as well as bar the remedy ? Mr. *Mitra* in his *Tagore Law Lectures* on *Limitation*, 4th Edition, says, at p. 14: "As to rights *in personam* it has been held that a right to receive payment of a debt does subsist even after the remedy by action has deen barred." The decisions in *Mohesh Lal.* v. *Busunt Kumaree*[3] and *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose*[4] are clear authority in favor of this view. See also the learned discussion of the question by Mr. Justice *Holloway* in *Valia Tamburatti* v. *Vira Rayan*.[5]

There is hardly any room for doubt in the face of the express language of S. 28 of the Indian Limitation Act

1. (1899) I. L. R. 22 M. 342.
2. (1883) 25 Ch. D. 666 at p 672.
3. (1880) I. L. R. 6 C. 340.
4. (1886) I. L.R. 14 C. 50.
5. (1877) I. L. R. 1 M. 228.

XV of 1877 which merely extinguishes the right to property when the period is determined for suits for recovery of such property. Whenever personal actions are barred, the rights themselves are not extinguished. That the principal debtor is not discharged by lapse of time may also be gathered from S. 25, Clause 3, and S. 60 of the Indian Contract Act IX of 1872. A barred debt is a good foundation for a written promise to pay signed by the party liable to be charged therewith. It is impossible to regard a debt as discharged by limitation when S. 60 of the Indian Contract Act speaks of a barred debt as a lawful debt, actually due and payable to the creditor. Unless a law of limitation operates as well as a law of extinction, prescriptive omission to sue cannot discharge the debtor. Limitation which merely bars the remedy is never spoken of in works on Jurisprudence as a mode of discharging an obligation. HOLLAND, enumerating the modes of termination of rights *in personam*, does not refer to limitation as one of them; See HOLLAND'S *Jurisprudence*, 10th Edn., pp. 306 to 311. ANSON in his work on *Contracts* treating of the "discharge" of contracts says: "At common law lapse of time does not affect contractual rights; such rights are of a permanent and indestructible character unless, either from the nature of the contract or from its terms, it be limited in point of duration. But though the rights possess this permanent character, the remedies arising from their violations are, by various statutory provisions, withdrawn after a certain lapse of time. The remedies are barred, though the rights are not extinguished". See ANSON'S *Law of Contracts*, 11th Edn., p. 343. It would therefore seem to follow that as mere omission to sue does not discharge the principal debtor, the surety is not discharged under S. 134 of the Indian Contract Act. It has been argued that the surety will be discharged if he is liable to be sued when he cannot have any remedies against the debtor after a suit against him has become barred. The answer is he is himself to blame. He can easily avoid the risk and clothe himself with all the creditor's rights by payment or performance as soon as the debtor becomes liable—S. 140 of the Indian Contract Act.

To make the position clear, S. 137 of the Indian Contract Act expressly says that mere forbearance to sue does not

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discharge the surety. We may add, whatever the length of the period of forbearance, the fact that the illustration to the section mentions one year as the period of forbearance cannot involve the implication that if the period is three years the surety will then be discharged. We are unable, therefore, to agree with the decision in *Ranjit Singh* v. *Naubat*[1]. The ground of the decision in *Hazarimal* v. *Krishnarav*[2] followed in *Sankana Kalana* v. *Virupakshaph Ganashapa*[3] and *Kristo Kishori Choudrain* v. *Radha Momun Munshi*[4] commends itself to us. The decision in *Jambu Ramaswami Baghavathar* v. *Sundararaja Chetti*[5] proceeds on a different ground, namely, that a suit against the drawer maintainable at the date of institution does not cease to be so because it is barred as against the acceptor where he is subsequently added as a party-defendant. We must, therefore, dismiss the appeal as against the defendants Nos. 1 to 3, but, as regards the other defendants, the decrees of the Courts below must be reversed and the suit remanded to the Court of first instance for disposal according to law. There is no question of personal liability. The liability of the property given as security has alone to be determined with reference to the issues raised. The appellants will pay the costs of the defendants Nos. 1 to 3 throughout. The costs of the other parties will be provided for in the revised decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Munro.

K. A. Veeraraghva Tathachariar & others .. Appellants* (*Petitioners-Plaintiffs.*)

v.

R. Krishnasamy Thathchariar & others .. Respondents. (*Respondents-Defendants.*)

Veeraraghva Thatha-chariar v. Krishnasamy Thatha-chariar.

C. P. C. (Act XIV of 1882), Ss. 503, 539—Subject of suit—Scheme suit for temple without a prayer for removal of trustees.

In a suit for a scheme in respect of the management of temple without a prayer for the removal of the trustees, the property of the temple is the subject of the suit within the meaning of S. 503, C.P.C., and the Court is competent to direct the appointment of a receiver.

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* A. O. No. 143 of 1907. † 16th January 1908 and 23rd March 1908.

1. (1902) I. L. R. 24 A, 504.
2. (1881) I. L. R. 5 B. 647.
3. (1883) I. L. R. 7 B. 146.
4. (1885) I. L. R. 12 C 330.
5. (1902) I. L R. 26 M. 239 at 242.

Appeal from the order of the District Court of Chingleput, 1907 in Miscellaneous Petition No. 120 of 1907 in O. S. No. 11 of 1907.

Veeraraghava Thathachariar v. Krishnasamy Thathachariar.

V. V. Srinivasa Aiyangar for appellants.

K. Srinivasa Aiyangar (for *V. Krishnaswami Aiyar*) and *S. Srinivasa Aiyar* for respondents.

The Court made the following

ORDER†:—This suit is brought under S. 539 and S. 30, Civil Procedure Code, for a declaration that a scheme of management of a temple is binding, and, in the alternative, for the settlement by the Court of a scheme and for the appointment, in the meanwhile, of a Receiver.

Though there are various allegations made against the Dharmakarthas, there is no application for their removal. At first, on the filing of the suit, an application was made for a Receiver pending the suit, and a Receiver was appointed temporarily until notice had gone to the defendants to show cause against the application. On the application coming on it was objected for the defendants that the Court had no jurisdiction under S. 503, Civil Procedure Code, to appoint a Receiver, as the temple property was not the subject of the suit or under attachment. The District Judge thereupon dismissed the application and this appeal is now brought against his order.

The subject of the suit is, a scheme for the management of the property of the temple and, in our opinion, the property of the temple is therefore the subject of the suit within the meaning of the words in S. 503, Civil Pocedurer, Code. The whole aim and object of the suit is to regulate the collection and distribution of the property of the temple and even though there is no application for the removal of the Dharmakarthas (in which case there can be no doubt that the Court would have power to appoint a Receiver pending the appointment of fresh Dharmakarthas to take charge of the property of the temple) the subject of the suit is the same in both cases, namely, the property of the temple.

In these circumstances we must set aside the order of the District Judge and adjourn the case for the question of the person

† 16th January 1908.

to be appointed receiver to be heard and determined, till the 6th February. Costs will be reserved.

This appeal again coming on for hearing this † day after adjournment as per above order of the Court

The Court delivered the following

JUDGMENT :—We confirm the appointment of the Receiver. The appellants are entitled to costs in this and in the lower appellate Conrt.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*FULL BENCH*).

Present:—Mr. Justice Benson, Mr. Justioe Wallis and Mr. Justice Krishnaswami Aiyar.

Vidyapurna Thirthaswami .. Appellant* (*Plaintiff*)

v.

Uggannu .. .. Respondent (*Defendant*).

Vidyapurna Thirthaswami v. Uggannu.

Land Tenure—Mulgeni Tenure—Increase in Government assessment—Liability to pay—Mulgar liable to pay.

In the case of Mulgeni tenures in South Canara, if the Mulgenidar pays the increase of revenue, he is entitled to recover it back from the Mulgar (under S. 35 of the Revenue Recovery Act), in the absence of any provision in the Mulgeni Chit about the liability to pay the increase in Government assessment, the Mulgar being the "landholder" within the meaning of the Revenue Recovery Act, even though it may be that both the Mulgar and the Mulgenidar will have to bear the burden in equitable proportion but for S. 35 of the Madras Revenue Recovery Act.

Second Appeal from the decree of the District Court of South Canara in A. S. No. 144 of 1906 presented against the decree of the Court of the District Munsif of Mangalore in O. S. No. 84 of 1905.

P. R. Sundara Aiyar and *K. Yajnanaraina Adiga* for appellant.

K. Narayana Rao fcr respondent.

P. R. Sundara Aiyar contended that the revenue was a charge on the land by S. 2 of the Revenue Recovery Act, and that therefore the revenue was, in the absence of any contract to the contrary, payable by the owners of the various interests in the land in proportion to their respective interests. This is the principle applied in England in the incidence of

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* S. A. No. 229 of 1907. † 23rd March 1908. * 5th May 1910.

land tax—see *Watson* v. *Home*[1]; *Mansfield* v. *Relf*[2]; *Whitefield* v. *Brandwood*[3]; WOODFALL (18th Edn.) p. 636; *Smith* v. *Humble*[4]; *Chandler* v. *Webster*[5]; cited also *Elliott* v. *Crutchley*[6]. This principle has been, with a slight variation, applied in S.A. 582 of 1908; *vide* also *Mahamad Sahai* v. *Mussmat Sayedunissa*[7]. Where there is no contract, the right principle to apply is 'he who enjoys the benefit, must bear also the burden'—*Subrahmaniem* v. *Venkatasubbaraya*[8].

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The extra burden that is imposed is not a burden contemplated by the parties, and therefore it must be borne by the parties in proportion to their interest.

He submitted that the cases in *Babshetty* v. *Venkataramana*[9] and *Ranga* v. *Subba Heggade*[10] proceed upon the footing that the claim is a claim for enhancement of rent. It is no more a claim for enhancement of rent or an attempt to make a new contract between the parties than that in *Krishnier* v. *Arappuli Aiyar*[11]. The case of *Secretary of State* v. *Fernandes*[12] simply follows the Bombay cases and does not refer to the relevant sections of the Revenue Recovery Act. He submitted that the pattahdar merely represents the land so far as the Government is concerned, and the fact that he has been selected to represent the land does not take away the liability to contribute. Reference was made to Order 31 of Board's Standing Orders. S. 35, he submitted, provided only for cases where, as between the tenant and the landlord, the landlord alone was bound to pay. He submitted also that in this case the tenant was either the pattahdar himself or was a joint pattahdar with the landlord, and that this case stands uncomplicated by any broader question. He also referred, on this subject, to G. O. 757 of 25-8-1902.

K. Narayana Row—for respondent—submitted that in effect it would be making a new contract between the parties and that the cases *Babshetty* v. *Venkatramana*[9] and *Ranga* v. *Subba Heggade*[10] were rightly decided. He referred to the *South Canara*

1. (1827) 31 R. R. 200.
2. (1908) 1 K. B. 71.
3. (1818) 20 R. R. 712=2 Starkie 440.
4. (1854) 15 C. B. 321.
5. (1904) 1 K. B. 493.
6. (1906) A. C. 7.
7. (1907) 12 C. W. N. 154.
8. (1906) 18 M. L. J. 563.
9. (1879) I. L. R. 3 B. 154.
10. (1880) I. L. R. 4 B. 473.
11. (1904) 14 M. L. J. 488.
12. (1907) I. L. R. 30 M. 375

Vidyapurna thirthaswami v. Ugganu.

Manual, p. 118, as to what *warg* was, and contended that the landlord was the owner of the reversion, and was entitled to the property on failure of heirs of the *mulgenidar*—*Timmarsa Puranik Badiya Kuppa Gouda*[1] ; that the only person that was liable under the Rent Recovery Act was the *pattahdar*. He referred to Ss. 1, 2, 11, 41 and 42 and said that S. 35 of the Revenue Recovery Act was conclusive of the tenant's rights ; that it was not open to the Government to make any man represent the land. He referred also to 15 Bom. Gazetteer 180 (Vol. ii) to show how the question had been dealt with in Bombay.

P. R. Sundara Aiyar, in reply, referred to MACKLEDY'S *Roman Law* and HUNTER'S *Roman Law on Empheteuta* with reference to the incidence of taxation. *Cur ad Vult.*

On further argument, he referred to preamble to Regulation XXVI of 1802. The tax itself is on the land. The tax is not a personal tax, with land as collateral security. The *dicta* bearing on the question as to whether Government could register the tenant as pattadar are to be found in *Muthunaiyan* v. *Sinna Samavaiyar*[2]; *Madathapu Ramayya* v. *Secretary of State*[3]. They only say that a trespasser cannot be registered ; referred to MACLEAN'S *Standing Manual*, Vol. I p. 122.

Pattah is not a muniment of title but only records fiscal arrangements with the Government—Standing Order No. 31. The question is as to who is the proprietor. Proprietorship is cut up into many parts. The Government registers the largest or the most dominant partner but still the others are to contribute their share. The *mulgenidar* is really a sort of subordinate proprietor. *Subramania* v. *Mahalinga*[4] does not touch the point.

[*Wallis* J. referred to *Abhiram Goswami* v. *Shyamacharan Nandi*[5].]

K. Narayana Row, contended that it is only the *wargdar* that is the proprietor whose name can be registered. The Government's action in registering one who is admittedly owner of a fractional interest would be *ultra vires*. *Cur ad Vult.*

The Court made the following

ORDER †.—The District Munsif states that the *mulgar* and the *mulgenidar* are jointly entered in the register as

1. (1865) 2 B.H.C. 66.
2. (1905) I.L.R. 28 M. 526.
3. (1903) I.L.R. 27 M. 386, 396.
4. (1909) 19 M.L.J. 627 (F.B.)= I.L.R. 33 M. 41.
5. (1909) I.L.R. 36 C. 1003 (P.C.)

† 29th October, and 1st November 1909 ; 18th February 1910.

puttahdars. The District Judge says that the mulgar is the puttahdar and this seems to be supported by Exhibit D. It is strongly contended before us that the mulgenidar alone is the puttahdar, and the puttah, Exhibit B, as translated to us, seems to bear this interpretation. We must ask the District Judge to enquire and report who is, in fact, the registered puttahdar.

Fresh evidence may, if necessary, be taken on this question. The report should be submitted within one month, and seven days will be allowed for filing objections.

In compliance with the above order, the District Judge of South Canara submitted his report to the effect, that the plaintiff, according to the true translation, was the registered puttadar. Defendant's name was merely entered on the puttah as the mulgeni tenant under the plaintiff.

This second appeal coming on for final hearing after the receipt of the above report the Court delivered the following

JUDGMENTS:— *Benson*, J.:—In this case the question for decision is whether the defendant, who is the holder of certain land on mulgeni tenure in South Canara, under the plaintiff, who is the mulgar, is bound to pay the whole or any part of the increased assessment imposed upon the land by Government at the recent re-settlement of the District. The question is of great general importance as the mulgeni tenure is very common in South Canara, and in some cases the increase in the assessment is more than the whole rent reserved to the mulgar, so that if the whole increase of assessment is thrown on the mulgar alone, he will cease to derive any benefit at all from the land, except such as may arise from a remote reversionary interest. The plaintiff, who is the mulgar, is the holder under Government of an estate, or *warg*, consisting of various portions of land. Under the old revenue settlement of 1819 such estates in South Canara were liable to pay a lump sum as assessment on the whole estate, instead of having an assessment fixed on each field or portion of the estate as is usual in other parts of this presidency. In 1870, the plaintiff granted to the defendant a portion of this land on a perpetual lease, (mulgeni chit) Exhibit A, the terms of which are as follows:—

"46 field plots of the seed area of 6¾ mudis, total bail, majal, bettu of the total seed area of 10 mudis, 52 fruit bearing

cocoanut trees, 4 plants, I Jack, 1 Hebbalasu tree, 5 Honne, 3 palmyras, 6 tamarind and sundry trees, built house, cowhouse, outhouse, tank, well, etc., for which Rs. 95 in cash; Rs. 2 for road cess; total Rs. 97—ninety-seven are fixed, which sum you shall pay yearly to the treasury within Palguna Bahula 30 of each year from this year onward and get receipt. You may effect improvements on the said property and enjoy from generation to generation. Neither the Mutt has reason to ask for more rent than that hereby fixed, nor you that the rent should be lessened. Not only will you deliver up the land at the time when you do not want them, [on taking the improvements which respectable persons (sic) value from the treasury if any improvements have been effected thereon] but you have no reason to alienate to anybody in any manner, your rights on the security of this instrument. If the rent is in arrears by not being paid within the time above described, you must pay it with interest at 12 per cent after the time; you shall also give two vegetable loads and compulsory labour (bitti) in the same manner as for tenants conduct themselves.* You cannot disfigure the land by cutting down prohibited trees, etc. To such effect is the mulgeni chit executed."

It will be observed that this document does not make any reference to the Government assessment, or as to who is to pay it.

As a matter of fact there was no separate assessment of revenue on the portion alienated, and the plaintiff continued to pay Government the assessment on the whole *warg* after the grant of the *mulgeni*, just as he did before the grant. But in the recent settlement of the District the assessment was largely increased and it was fixed on each field and a separate puttah (Exhibit B) was issued in respect of land held by the defendant under his mulgeni lease in which the assessment on this land was fixed at Rs. 48-5-0 per annum.

There was a dispute before us as to who is the puttahdar in Exhibit B and therefore the "land-holder" under S. 1 of the Rent Recovery Act, II of 1864, and bound to pay the revenue to Government under S. 3 of the Act, as held in the recent

* Except the cutting of fuel and leaf for purposes of cultivation of the land.

Full Bench case of *Subramania Chetty* v. *Mahalingasami Sivan*,[1] reported in 19 M.L.J. 627.

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As the document was translated to us, the defendant (mulgenidar) appeared to be the puttahdar; but the District Judge had stated that the plaintiff (mulgar) was the puttahdar though the defendant's name was shown in the puttah as mulgenidar, and the District Munsif had stated that the puttah "stands in the name of both the plaint mutt and the mulgeni tenant, and, therefore, so far as the Government is concerned, the mulgeni tenant is as much bound to pay the assessment as the mutt. As between the landlord and the tenant the question is one of contribution."

In this state of things we referred an issue to the District Judge to decide who is, in fact, the registered puttahdar. His finding is that according to the true translation of Exhibit B the plaintiff-mulgenidar is the puttadar and that the entry relating to the defendant-mulgenidar is not to the effect that he is the puttahdar, or even a joint puttahdar, with the plaintiff in the ordinary sense, but merely the mulgeni tenant under the plaintiff as landlord. Objection has been taken before us to this construction of the puttah, but we are satisfied that it is the true construction. It is therefore not necessary for us to consider whether Government could legally grant a puttah to the mulgenidar solely or jointly with the mulgar, on the ground that the mulgenidar now has a larger interest in the land than the mulgar.

The plaintiff being the puttahdar, and the defendant being his tenant, and having paid the revenue due on the land in Exhibit A, the defendant is entitled to recover the same from the plaintiff in accordance with the provisions of S. 35 of the Revenue Recovery Act II of 1864, which enacts that it shall be lawful for any person claiming an interest in land which has been, or is about to be, attached, to obtain its release by paying the arrears of revenue, and adds that "all such sums, if paid by a tenant, may be deducted from any rent then or afterwards due by him to the defaulter."

If the plaintiff were allowed to succeed in the present suit he would deprive the defendant of the right secured to him by

1. (1909) I. L. R. 33 M. 41.

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this provision of law. On this short ground the appeal must fail.

But in the argument before us the effect of S. 35 was hardly at all considered. Both sides argued the appeal on general principles and with reference to what would be equitable apart from S. 35. In view of the hardship which the new settlement has caused to many of the mulgars, and the possibility that the matter may be the subject of legislation, I will now refer to those arguments.

The plaintiff's vakil contended before us that the whole of the increase over what may be called the old assessment should be borne by the defendant or that the increase should at least be shared between the plaintiff and the defendant in proportion to the benefit which each derives from the land. He based this claim mainly on the contention that the defendant under the terms of Exhibit A is in fact the beneficial owner of the land subject to a fixed perpetual rent charge in the plaintiff's favour, and that the plaintiff is in the position of a person who has only such a charge.

I am unable to accede to this contention. The respective interests of the mulgars and mulgenidars are well described in Sturrock's Manual of the District, page 130, Volume I, in these terms:—" The *mulgeni* or permanent lease is of very old standing in Canara and is described as follows in the proceedings of the Board of Revenue, dated 5th January 1818:—

"The *mulgenidars* or permanent tenants of Canara were a class " of people unknown to Malabar who on condition of the pay- " ment of a specified invariable rent to the *muli* or landlord and " his successors, obtained from him a perpetual grant of a certain " portion of land to be held by them and their heirs for ever. " This right could not be sold by the *mulgenidar* or his heirs, but " it might be mortgaged by them and so long as the stipulated " rent continued to be duly paid, he and his descendants inherit- " ed this land like any other part of their hereditary property. The " landlord and his heirs were precluded from raising the rent " of the permanent lessee. It was, therefore, originally either " higher than that procurable from temporary tenants, or " it was fixed at the same or at a lower rate in consideration of

" a certain sum being paid as premium or purchase money for " the grant in perpetuity, or as a favour conferred by the land- " lord, on some of his dependents. It amounted in fact to a per- " manent alienation of a certain portion of land by the landlord, " for it never again lapsed to him or his descendants except on " the failure of heirs to the permanent lessee. This class of " people may, therefore, be considered subordinate landlords " rather than tenants, especially as, though many of them cultiva- " ted their lands by hired labourers or slaves, others sub-rented " them to *chalgenigars* or temporary tenants."

The *mulgeni* of the present day differs but little from that above described. In some cases sale is allowed as well as mortgage, but in others, and probably in the majority of *mulgeni* leases now executed, the lessee's powers of alienation are much restricted, and forfeiture of the lease is provided for non-payment of rent, for waste, or for unauthorized alienation. As a set off against the forfeiture for alienation, it is provided that, if the lessee desires to give up the land, he shall do so to the lessor, receiving from him the value of any improvements that may have been made. In some cases a premium is paid in addition to the rent reserved.

It will be observed that under the terms of Exhibit A the defendant is restrained from alienation, and even from cutting wood, except for limited purposes; and under the customary or common law of the district, the plaintiff appears to have the reversionary interest in the land on failure of heirs to the mulgenidar. Both the plaintiff and the defendant have interests in the land, and those interests are defined partly by the terms of the contract between them, Exhibit A, and partly by the incidents which the customary law attaches to the tenure.

I cannot on the other hand accept the defendant's contention that under the terms of Exhibit A the plaintiff is bound to pay the whole of the increase in the assessment imposed by Government.

Exhibit A contains no provision for the contingency that has arisen, and there is no reason to suppose that either party in 1870 at all contemplated that contingency.

It must be remembered that from the date of "the tharao settlement" in 1819 no change had ever been made by Govern-

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ment in the assessment then fixed on the various wargs throughout the District. It had remained unchanged for 50 years and there is no indication in Exhibit A that either party to it contemplated the possibility of an enhancement of the assessment. The fact that the plaintiff had always paid the then existing assessment on the warg and made no provision for transferring to the mulgenidar any increase that might be imposed in future by Government cannot, in the circumstances of this case, be taken to indicate an implied contract that the plaintiff would pay such increase.

In the recent case of *Mahamad Sahai* v. *Mussammat Sayedunissa Bibi*[1] the perpetual lease granted by a Zemindar to his tenant provided for the rent in these terms: "At varying jamas, to wit, on an annual uniform Jama of Rs. 1,580 from 1289 to 1291 (Fasli) and at an annual uniform consolidated Jama of Rs. 1,585 of the current coin from 1292 (Fasli) together with *abwab*, such as, *selami* for Dusserah and Holi, Purkha, Sair, Road cess, Public Works cess, etc., all of which are included in that very sum of Rs. 1,585." The High Court of Calcutta held that "the contract did not provide that if the cesses were increased in future the additional burden should fall upon the landlord. The only reasonable interpretation of which the covenant in question is capable is that the amount annually payable by the tenant, namely, Rs. 1,585, included *abwabs*, Road cess and Public Works cess. No dubt it was a consolidated amount, but the contract does not provide for the contingency which has happened, namely, an increase in the amount of cesses levied by the State".

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"The clause in question in the lease now before us seems, therefore, to imply nothing more than this, that Rs. 1,585 was the total amount inclusive of *abwabs* and cesses. There is nothing to show that the parties contemplated a possible increase in the amount of cesses leviable by Government, and they do not appear to have provided for this particular contingency. If so, the obvious result is that the rights and liabilities of the parties must be regulated by the statute only, except in so far as the contract has made provision to the contrary."

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1. (1907) 12 C.W.N. 154.

Vidyapurna Thirthaswami v. Uggannu.

Benson J.

In the case before us the contract between the parties does not provide, nor has Government directly declared by law, how the increased assessment is to be distributed between the mulgar and the mulgenidar or other persons interested in the land though S. 35 of the Revenue Recovery Act does, as we have seen, indirectly, and as it were unintentionally, imposed the whole burden on the pattahdar.

Before considering how the enhanced assessment ought, in accordance with principle, to be distributed between the mulgar and mulgenidar, I may refer briefly to the cases relied on by the defendant as supporting his construction of Exhibit A. Those cases are *Babshetti* v. *Venkataramana*[1] and *Ranga* v. *Subba Heggade.*[2] These cases were followed, but without discussion, by a Bench of this Court in S. A. No. 1245 of 1907 (unreported).

In the earlier of the Bombay cases the terms of the mulgeni chit are not set forth, but it is stated that "the plaintiff's claim may properly be regarded as one to recover arrears of rent at a rate exceeding that engaged for in the *kabuliyat* by the same sum that the Government assessment which the plaintiff himself now has to pay exceeds what he paid when the *mulgeni* contract was made" (p. 157), and this claim was negatived on the ground that the rent was fixed by the terms of the contract.

The later of the Bombay cases treated the question as settled by the authority of the earlier case.

It may, I think, be doubted whether these cases apply to the present case, for the claim of the plaintiff in the present case cannot, in my opinion, be properly regarded as a claim for an enhanced rent. The rent has been fixed by the contract (Exhibit A), but the imposition of a higher assessment by Government is a matter outside the terms of the contract altogether and is not provided for in it either expressly or impliedly.

The assessment has nothing to do with the rent. The plaintiff does not seek to recover it as rent, though he says that the defendant may be declared to be liable to pay it along with the rent, this being no doubt a matter of convenience. The proper view appears to be that a burden has been unexpectedly thrown on the land by the Government, and the question is how

1. (1879) I.L.R. 3 B. 154. 2. (1880) I.L.R. 4 B. 473.

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this burden ought to be distributed between the persons interested in the land. This aspect of the question was not considered in the two Bombay cases. The theory on which the land assessment is fixed in this Presidency is that the Government is entitled to a certain share of the produce of the land, and the money assessment is the value of that share. When an enhanced assessment is imposed it is usually due to an increase in the money value (or price) of the produce, or it may be due to increased productiveness of the land, improvement of communications and opening up of new markets, or because the former assessment was for any reason too low. (Standing Orders of the Board of Revenue, Chapter I. Part I, S. O. 1.)

In the present case the plaintiff alleged that the increase of assessment was due to improvements made by the defendant and argued that for this reason the defendant should pay the increased assessment or at least so much of it as was due to the improvements. The District Munsif, however, found that the increase was not due to the tenant's improvements and I may say that it would ordinarily be difficult to prove that the whole or any definite part of the increase is due to such improvements since the Settlement Department, as I understand, does not ordinarily tax such improvements but takes into consideration a great variety of other circumstances in fixing the assessment, and deals with large tracts of country rather than individual fields. (Standing Orders of the Board of Revenue, Chapter I Part I. S. O. 1).

Even if a part of the increased assessment were due to the defendant's improvements, I doubt whether this should absolve the plaintiff from all liability in respect of such part, since his reversionary interest would have been rendered more valuable by the improvements effected and it would be reasonable that on this account he should bear a part of the increased assessment resulting from the improvements. I have said that the assessment is a burden imposed by Government on the land, and I think that this is the correct view since the assessment represents a share of the produce of the land, and under the Revenue Recovery Act II of 1864, S. 2 "the land, the buildings upon it, and its products, shall be regarded as the security of the public revenue."

As stated by Mr. Baden-Powell : "In Madras the system of Revenue Settlement does not involve the preliminary

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determination of any person to be the "proprietor" and to accept the settlement terms: it goes straight to the land, and determines, according to its own rules and principles, what that field or survey unit ought to pay, no matter who holds it." (Land System of British India, P. 33, Vol. III). It follows that in the absence of a contract to the contrary, express or implied, the burden should be shared *inter se* by the persons interested in the land in proportion to their respective interests, that in proportion to the benefit which each derives from the land. This was the conclusion recently arrived at by a Bench (*Miller* and *Sankaran Nair*, JJ.) of this Court in a very similar case from the same district (S. A. 582 of 1908 unreported in which, however, no reference was made to the effect of section 35 of the Act) and it is the principle adopted in the English Land Tax Act. As observed by *Vaughan Williams*, L.J. in *Mansfield* v. *Relf*[1]: "Under the Land Tax Act, irrespective of any covenant on the subject, the incidence of land tax on the persons interested in land is intended to be proportionate to the benefit which they respectively derive from the land, whether in the shape of rent or occupation."

In the present case we have found that there was no contract, express or implied, between the plaintiff and defendant as to how the increased assessment should be borne. It ought, therefore, in accordance with principle, to be shared between them in proportion to the benefit which each derives from the land, but having regard to S. 35 of the Act we cannot give effect to this view and must dismiss this second appeal with costs.

Wallis J :—In 1871 the plaintiff demised the suit lands on a perpetual lease to the defendant at a fixed rent under Exhibit A. None the less he still continued to be the proprietor of the lands—see the recent decision of the Privy Council in *Abhiram Goswami v. Shyama Charan Nandi* [2]—and therefore, as will be shown, he also continued to be the " landholder, " as defined in the Revenue Recovery Act, of these and the other lands comprised in the warg and to be liable for the assessment fixed on the warg, and if such assessment was allowed to fall into arrears and was paid by the tenant, the defendant, the defendant was entitled to deduct the sums so paid from any rent then or afterwards due to the plaintiff

1. (1908) I.K.B. 71 at p. 7?. 2. (1909) I. L. R. 36 C. 1003 at p. 10[illegible]

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under S. 35 of the Act. Thus the tenant did not by the terms of his contract undertake to contribute to the assessment, but only to pay the fixed rent in consideration of which he was to be entitled to the enjoyment of the premises, and the law, on the other hand, entitled him to deduct from such fixed rent any assessment he had to pay to prevent the demised land from being sold for arrears of revenue. It may, I think, be inferred in the peculiar circumstances of South Canara where these lands are situated, that neither the plaintiff nor the defendant, at the time of entering into the lease, contemplated the eventuality of an increase in the assessment, but I cannot see how a subsequent increase contrary to the expectation of the parties can affect the right of the tenant to enjoy the premises at the stipulated rent, or deprive him of the right conferred upon him by S. 35 of deducting any assessment he has to pay from the rent payable to the plaintiff. The plaintiff is undoubtedly the proprietor of the lands and as such is the person to be registered under S. 2 of Regulation XXVI of 1802, and there can, I think, be equally little doubt that the registered proprietor is the "landholder" within the meaning of the Revenue Recovery Act. This was expressly decided by this Court after full consideration in *Secretary of State* v. *Ashtamurthi*[1] and the Legislature, accepting and acting on that decision, proceeded to pass Madras Act III of 1896. In Malabar as recited in that Act, landed property had in many cases not been registered in the names of the proprietors thereof, and it was therefore thought proper to provide a summary means of ascertaining who these proprietors were so that the land might be registered in their names. Section 13 provides that the proprietor ascertained in this summary manner and registered as such "shall be deemed to be the 'land holder' in respect of such estate within the meaning and for the purposes of the Madras Revenue Recovery Act, II of 1864, and no proceedings taken under the said Act against such person or against any land registered in his name shall be deemed invalid or ineffectual by reason of any error in such registration or on the ground that such person was not the real or sole proprietor." The Legislature could not well have indicated more clearly that the

1. (1890) I. L. R. 13 M. 89.

proprietor is the landholder within the meaning of Act II of 1864. In these circumstances it seems to me clear that, the plaintiff being the proprietor and having been registered as such and revenue collected from him as landowner, Government could not, if so minded afterwards, transfer the status of landholder to the tenant. I say this because it was suggested in the present case that the pattah which has been put in evidence should be read as issued to the defendant and not to the plaintiff. It has now been ascertained that this is not so, but, even if it had been, I do not think the issue of a pattah to the defendant would have the legal effect of making the defendant the landholder instead of the plaintiff. I may observe further that whatever was done in this case the G. O. settling the terms of re-settlement which was read to us during the argument directs the pattahs to be issued to the wargdars—obviously the correct course. In the *Secretary of State* v. *Fernandes*,[1] to which I was a party, the question whether the Government could by an executive act convert mulgeni tenants into landholders was raised, though it was not necessary to decide it, and the subsequent discussion has only served to confirm me in the opinion that Government has no such power. I also see no reason to differ from the decisions in *Baba Shetti* v. *Venkatramana*[2] and in *Ranga* v. *Subba Heggade*[3] which, in my opinion, are on all fours with the present case. It is true that the question whether the Court could treat the increased assessment as the imposition upon the land of a new charge not contemplated in the contract and apportion it between the parties interested was not in terms raised or considered in these cases. That of course would be the most equitable way of dealing with the question and I should be glad to see it dealt with by the Legislature on these lines, but it is not open to the Court, in my opinion, to do this as it would be opposed to the provisions of S. 35 of the Revenue Recovery Act. I am, therefore, of opinion that the District Judge was right and that the appeal should be dismissed with costs.

Krishnaswamy Aiyar J :—I agree in the judgment of Mr. Justice *Benson*. Section 35 of Act II of 1864 appears to me to be decisive. I express no opinion on the question whether it is competent to Government to give a ryotwari pattah to any one other than the proprietor of the land having only a subordinate interest in it.

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1. (1907) I.L.R. 30 M. 375.
2. (1879) I. L. R. 3 B. 154.
3. (1880) I. L. R. 4 B. 473.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Sennayan Chetty .. Appellant* (*Plaintiff*)

v.

Sinnappan Servai .. Respondent (*Defendant*).

Sennayan v. Sinnappan.

Religious office—Release to next man entitled—Validity of.

A renunciation of a non-hereditary religious office (*viz.*, a trusteeship of a private temple) which vested in the senior member of a family by virtue of a partition deed, in favor of the next senior is invalid in the absence of any rule of succession to the office binding upon the members either existing before or made at the time of partition.

Second appeal from the decree of the Temporary Subordinate Judge's Court of Madura in A. S. No.753 of 1907 presented against the decree of the Court of the District Munsif of Periyakulam in O. S. No. 193 of 1906.

This was a suit for recovery of properties mentioned in the plaint schedule from the defendant and for a decree for Rs. 227-5-4 due by the defendant as lessee, for rent. The plaintiff also claimed profits that might arise from the land until the date when the land was delivered over to him. It was alleged in the plaint that the properties in question had been, in a partition effected among the co-parceners of the plaintiff's family on the 7th June 1897, set apart for the due celebration of festivals in the Vishnu and Siva temples at Batlagunda. The deed of partition was filed with the plaint and it was stated in the plaint that Venkatraman Chetti, the plaintiff's brother, became under the terms of the deed, the trustee of the property with full powers to let it out to whomsoever he pleased, and that in pursuance thereof the said Venkataraman Chetti leased it out for a term of 10 years to the defendant. It was also alleged that Venkatraman Chetti was very indifferent about the administration of the trust: the plaintiff as the next senior member of the family assumed the duties of the trustee and got also from Venkatraman Chetti a release deed on 2nd January 1904 relinquishing in his favor his rights as the trustee of the property.

The defendant contended *inter alia* that the plaintiff had no cause of action against him and that the present suit could not lie because the requirements of S. 539, C.P.C., have not been complied with. Plaintiff's right as trustee was questioned. Venkatraman Chetti was not competent to relinquish his trusteeship during his lifetime in favor of the plaintiff inasmuch as the partition deed creating the trust did not provide for the delegation of powers by one trustee to another.

* S. A. 1820 of 1908. 23rd March 1910.

The following amongst other issues were framed :—

1. Whether the plaintiff had become trustee and whether he was entitled to be in possession of the plaint property.

2. Whether the renunciation by Venkatraman Chetti was true and valid as against the defendant.

3. Whether the plaintiff's suit was barred by S. 539, C.P.C.

The District Munsif found issues (1) and (2) in the negative and issue (3) in the affirmative. The District Judge concurred with the District Munsif, and hence the appeal.

P. C. Lobo for plaintiff-appellant.

C. Madhavan Nair for defendant-respondent.

P. C. Lobo.—A release or renunciation of a religious office, *e.g.*, the trusteeship of a temple, is valid if it is in favour of the person or persons next entitled, *Kuppa Gurukkal* v. *Doraiswami Gurukkal*[1]; *Narayana* v. *Ranga*[2]; *Mancharam* v. *Pranshankar*[3]; *Nirad Mohini Dassi* v. *Shibadas Pal*[4]. *Gopinatha* v. *Ramachandra*[5] decides that dismissal of a hereditary officer lets in the next heir.

C. Madhavan Nair.—The only Madras case which in any way implies the position of the appellant, and that too in a negative way, is *Narayana* v. *Ranga.*[2] The question is left open in *Annasami Pillai* v. *Rama Krishna Mudaliar*[6]. *Ramanathan Chetty* v. *Murugappa Chetty*[7] is an exception on account of its peculiar facts. The right to trusteeship is to be determined from the terms of the trust deed, if any, and if there is no deed, then from the usage of the institution. The Madras High Court has not accepted the position taken by the Bombay and Calcutta High Courts. If the trust is a public trust, then recourse must be had to the Courts for a valid appointment of the trustee. If it is a private trust, then all the members of the family in whom the trusteeship vests must join in regulating the succession. The deed of partition confines itself only to the case of one succession. There is no general direction as to how all successions are to be governed.

The Court delivered the following

JUDGMENT :—The only provision in the partition deed, Exhibit A, as to the devolution of the trusteeship is that "after the lifetime of the aforesaid Venkatraman Chetti the seniormost member for the time being shall manage the properties

1. (1882) I.L.R. 6 M. 76.
2. (1891) I.L.R. 15 M. 183.
3. (1882) I.L.R. 6 B. 298.
4. (1909) I.L.R. 36 C. 975.
5. (1896) 6 M.L.J. 255.
6. (1900) I.L.R. 24 M. 219.
7. (1903) I.L.R. 27 M. 192.

Sennayan v. Sinneppan.

endowed." There is no provision for the renunciation of the trusteeship by Venkatraman Chettiar and for the appointment by him of his successor. It does not appear from Exhibit A that this is a case of hereditary trusteeship.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller.

Ramaswami Pillai .. .. .. Petitioner* (*Plaintiff*)
v.
Kuppuswami Pillai .. .. .. Respondent (*Defendant*).

Ramasawmi v. Kuppusawmi.

Contract Act, S. 25, Cl. 3—Promise to pay a time-barred debt—Essentials.

Held, that the words "balance due Rs. 80" written in the plaintiff's accounts with the signature of the debtor is not a promise within the meaning of S. 25, Cl. 3 of the Contract Act, to pay a time-barred debt.

Semble:—The promise to which S. 25, Cl. 3, of the Contract Act, refers is a promise to pay with a consciousness that the debt is barred.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of Tuticorin in S.C.S. No. 1404 or 1908.

Suit on a pronote dated 19th July 1902.

The suit note, Exhibit A, bore an endorsement dated 3rd September 1905 (3 years beyond the date of the note) in the hand-writing of the defendant and signed by him to the effect that on settlement of account on that date, it was found that Rs. 220 had been paid and the "balance due was Rs. 80". The question was whether the suit was not barred. It was contended by the plaintiff-petitioner that the acknowledgment amounted to a promise to pay within the meaning of S. 25, Cl. 3, of the Contract Act.

S. Srinivasa Aiyar for petitioner.

A. S. Balasubramania Aiyar for respondent.

The Court delivered the following

JUDGMENT:—I agree with the decision in *Gobind Das* v. *Sarju Das* [1] which is in point. Even if the acknowledgment "balance due 80 rupees" implies a promise, it does not seem to me to be the promise required by S. 25 of the Contract Act. There is nothing to show that the debtor recognized that the debt was irrecoverable and still promised to pay it, and the promise to which S. 25 refers seems to me to be a promise to pay despite the consciousness that the debt is barred. The petition is dismissed with costs.

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* C. R. P. No. 289 of 09. 18th February 1910.

1. (1908) I.L.R. 30 A. 268.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Benson and Mr. Justice Abdur Rahim.

Chukkapalli Ramayya .. .. *Prisoner.**

Penal Code (Act XLV of 1860) *S.* 302—*Explosive Substances Act,—(Act VI. of* 1908) *Ss.* 3, 5—*Essentials for conviction—Evidence Act, Ss.* 106 *&* 114.—*Chemical Examiner's Report—Cr. P. C. S.* 378—*Supplementing prosecution evidence.* *In re Ramayya*

Per *Benson* J.:—If a person buries a bomb in a frequented path where it is almost certain to be trodden on and to explode and cause the death of any one treading on it, and if it does, in fact, explode and cause the death of any person, that person is guilty of murder unless he can explain his action in such a way as to negative the inference as to his intention which the nature and circumstances of the act suggest.

Per *Abdur Rahim* J.:—A Chemical Examiner's report is admissible in evidence without the Chemical Examiner being called as a witness. But the report can be of no use unless there is proof of the identity of articles found during investigation and sent to the Chemical Examiner with the articles examined by him.

It is the duty of the Prosecution to prove their allegations by means of sufficient and reliable evidence ; and if the evidence of the Prosecution is neither satisfactory nor conclusive, that defect cannot be cured by the fact that the accused is unable to make out positively that such evidence is false and has been manufactured by any particular person or persons interested in the prosecution. In a criminal trial even if the evidence in support of a charge is false, it would more often than not be impossible for an accused person to show how it came to be fabricated.

Under S. 5 of the Explosive Substances Act it is not necessary to come to any more definite finding than that the accused had possession of the explosive substance under suspicious circumstances ; but mere suspicion would not suffice for a conviction under S. 3 of the Explosive Substances Act, the gist of the latter section being the causing of an explosion unlawfully and maliciously which must be proved in the ordinary way.

The presumption under S. 114 of the Evidence Act cannot be invoked to the help of the prosecution for murder on the bare circumstance that the accused had got one of the implements which form an ingredient of a bomb prepared by a blacksmith some days before the occurrence and had given a false name to the blacksmith and had failed to give a proper account as to what became of the implement afterwards.

Where the deceased was blown to pieces by the explosion of an infernal machine buried in a pit dug in a frequented foot-path and upon the evidence it was found that the 1st accused had an iron arch used as an important part of the machine made through a blacksmith some days before the occurrence and when procuring it and on being questioned gave a false name and address and stated that it was required for the purpose of distillation (which purpose was not made out) and at the trial the prisoner

*Ref. Trial No. 39 of 1909.—Criminal Appeal No. 600 of 1909.

In re Ramayya.

denied having had anything to do with the iron arch and the explosive or infernal machine is such as is used for destruction of human life and property :

Held by *Benson* J. that the accused was guilty of murder under S. 302, I.P.C., and of the offences under Ss. 3 and 5 of the Explosive Substances Act VI of 1908.

(Per *Chief Justice* and *Abdur Rahim* J.)—The evidence was not sufficient to support either a conviction for murder under 302, I. P. C., or of an offence under S. 3 of the Explosive Substances Act VI of 1908.

Held Per *Curiam.*—The accused is guilty of an offence under S. 5 of Act VI of 1908.

On a reference under S. 378 of the Cr. P. C. where the Division Bench were agreed upon a particular conviction, the Judge hearing the reference was not entitled to go behind it, and hence the propriety of the conviction under S. 5 of Act VI of 1908 in the case could not be questioned.

Trial referred by the Court of Sessions of the Guntur Division for confirmation of the sentence of death passed upon the prisoner in Case No. 28 of the Calendar for 1909.

Appeal by the said prisoner against the said sentence and against the sentences of transportation for life under S. 3 of the Explosive Substances Act VI of 1908 and to transportation for ten years under S. 5 of the Explosive Substances Act VI of 1908.

P. R. Sundara Aiyar and *A. Krishnaswami Aiyar* for the prisoner.

T. Richmond for the Crown.

This case coming on for hearing before Mr. Justice *Benson*, and Mr. Justice *Abdur Rahim*, their Lordships delivered the following

JUDGMENTS:—*Benson* J:—In Sessions Case No. 28 of 1909 the Additional Sessions Judge of Guntur convicted the appellant, Chukkapalli Ramayya, of having murdered one Chennugadu on the 27th March last by means of a bomb, and sentenced him to death. The appellant was also convicted of minor charges under Ss. 3 and 5 of the Explosive Substances Act VI of 1908.

He appeals against his conviction on all the charges. Two other young men, Brahmans, were also tried with him but were acquitted.

It is clearly proved that in the early morning of the 27th March last a Pariah, named Chennugadu, was blown to pieces by the

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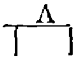
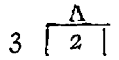
explosion of an infernal machine which had been buried in a pit about a foot deep and a foot wide which had been dug in a frequented foot-path between the villages of Nandivelugu and Tenali. Various broken fragments of the machine were found near the spot. The most important of these were a piece of iron band with a nipple soldered on it (Material Object No. 2), a similar piece of iron without a nipple (Material Object No. 3), a tin tube with a hole at each end (Material Object No. 1), some broken glass, and some pieces of paper with English print on them (Material Object No. 8). From these fragments and from the evidence of the Government Inspector of Explosives, who visited the spot on the 3rd April, it appears that the machine probably consisted of "(1) an outer thin iron cylinder, with an explosive at the bottom, (2) of an arch shaped like  over the explosive, of which material Objects Nos. 2 and 3 were parts, the nipple being hollow and containing the igniting substance, (3) the tin tube, Material Object No. 1, placed vertically over the nipple, the nipple fitting into a hole at the bottom of the tube, and (4) possibly a rod running through the tube which has holes at each end. His opinion is that the machine was buried in the ground with an inch or two of the tube exposed, the application to which of force either vertically or horizontally would spark the igniting substance and fire the explosive. The report of the Chemical Examiner embodied in Exhibit C, shows that the explosive used was a mixture of sulphide of arsenic and chlorate of potash. It was apparent from the beginning of the investigation that Material Objects No. 2 and 3 formed one piece originally. The ragged edges of each fit exactly. And it was also apparent from the other ragged edge of Material Object No. 2 that another piece or other pieces, similar probably to Material Object No. 3, had existed and had not been found. A search was instituted and on the morning of the 8th April, 1909, one was found. It is Material Object No. 9 and its edge exactly fits the other edge of Material Object No. 2. Material Objects Nos. 2, 3 and 9 thus form a kind of arch  and were undoubtedly originally one piece and probably also the whole piece as the other edge of Material Objects Nos. 2 and 9 are wrought smooth."

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It will thus be seen that a peculiar and essential portion of the bomb was the iron arch and the prosecution has proved by the evidence of five witnesses (Prosecution Witnesses Nos. 11 to 15) that the appellant got this arch made about ten days previous to the explosion by a blacksmith of Tenali named Rajagopalan (Prosecution Witness No. 11), and that the appellant when asked his name by the smith gave a false name and a false residence and a false purpose for which the iron was required. The chief question in the case is whether the evidence of these men is true, as alleged by the prosecution, or false, as alleged by the defence.

[After stating the account given by the witnesses and discussing the circumstances which, according to his Lordship, shewed the truth of that account, his Lordship proceeds:—]

On this evidence it would seem to be difficult to deny that the 1st accused is the man who got the arch (Material Objects Nos. 2, 3 and 9) made by Rajagopalan some ten days before the explosion. The defence has, however, made an elaborate attempt to show from the prosecution evidence that the prosecution has completely changed its original ground. The contention is that Subbarayudu originally told the police that the man who got the arch made was one Kadayala Kottayya of Kettevarom, that that man was the brother-in-law of the Village Magistrate, and that the latter and the police got the witnesses No. 11 to 15 to change their story and accuse the 1st accused instead of the Village Magistrate's brother-in law. It is, however, a significant fact in connection with this defence that 1st acused, in his statement in the lower Court or throughout the trial there, never put forward such a defence or hinted in any way that he had been made the scapegoat for the Village Munsif's brother-in-law. In his statement he hints he has been made the scapegoat for the Karnam's son, a different person altogether from the Village Munsif's brother-in-law. As, however, the contention has been strongly urged before us, it is necessary to examine it in detail. It will be remembered that Subbarayudu, in his evidence already quoted, said that when he told the constable about having seen a thing like the bit of the bomb he had with him made at Rajagopalan's smithy, he said that the constable took

him to the Inspector and that he then told the Inspector that the man who was getting it made said he was Kadayala Kottayya of Kattavaram and described him as a man a span taller than the witness, fair, and with a beard 6 or 7 inches long. The Inspector referred to is the local Inspector, Kasim Khan (Prosecution Witness No 25).

[After stating the evidence of the Inspector, on this part of the case, His Lordship proceeds :—]

The Inspector's examination in the Sessions Court, however, removes all doubt as to his meaning; and a reference to his note-book which both the Sessions Judge and this Court sent for and examined show clearly that the information given by Subbarayudu to this Inspector on the 3rd April, as recorded by him on that day, was that he saw "a man whose name is said to be Kadayala Kottayya of Kattevaram" getting the iron made, and he added "I did not see him before this." If he had not seen him previously he could not have then known him as Kadayala Kottayya of Katteveram. His knowledge was evidently derived from what the man said of himself. What is recorded in the note-book cannot, of course, be used as evidence against the accused, but it is admissible for the purpose of showing that the words in Exhibit *I should not be construed as contradictory of the witness's evidence at the trial or as showing that the latter is false. It is clear beyond doubt that from the beginning the case for the prosecution was that the man gave himself out as Kadayala Kottayya of Katteveram, not that Subbarayudu knew him previously by that name and address. [The learned Judge then discusses the evidence supporting the above point.]

The defence has dwelt on the improbability of a man getting part of a bomb openly made by a strange smith and in the presence of witnesses. The argument is entitled to weight, but it must be remembered that whoever wanted an iron implement like the arch and nipple would, of necessity, have to go to some smith to get it made. The thing in itself would not suggest any preparation for an offence, and the man may well have failed to realise that it would be found after the explosion and give a clue

[*Evidence of Subbarayudu at the preliminary inquiry :—ED.]

In re Ramayya.

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to the offender. Moreover, it was probably safer to go in an ordinary way by daylight than to attract suspicion by going secretly, or at night. The smith and his assistants were comparatively recent arrivals at Tenali and did not previously know the 1st accused or his address. He probably did not anticipate witnesses like the 12th and 15th Prosecution Witnesses coming in while the thing was being made.

On the whole, then, it must be held that the evidence of Prosecution Witnesses Nos. 11 to 15 establishes beyond reasonable doubt that it was the 1st accused who got the iron arch (Material Objects Nos. 2, 3, 9) made about ten days before the explosion, and that he then gave a false name and address, and falsely stated that he was having it made for the distillation of essences.

Apart from the making of the iron arch, the prosecution has sought to establish the guilt of the 1st accused by showing that at the search of his house, two hours after his arrest on the 6th April, a paper with a little picric acid in it was found tied in a corner of a cloth in his house and also that a quantity of violet powder was found in his house wrapped in a piece of paper [Material Object No. 13) which was part of page 14 of the Introduction to the "Report of the Tenth National Indian Congress, 1894." It will be remembered that among the scattered contents of the bomb found at the scene of the explosion were a number of bits of paper (Material Object No. 8). That these were part of the contents of the bomb is proved by the Chemical Examiner's report which shows that they bore traces of sulphide of arsenic and chlorate of potash, which chemicals formed the explosive material of the bomb. These bits of paper are proved to be portions of various pages of the Introduction to that Report including page 14 which is also the page to which Material Object No. 8 belongs. It is not proved that Material Object No. 13 and any of the bits of print in Material Object No. 8 belong to the same identical page of one particular copy of the Report of 1894. All that can be said is that each belongs to page 14 of some copy of that report. They may both belong to the same copy or to different copies. It is pointed out by the defence that copies of old books like this Report may be sold as waste paper and used for wrappers by the shops, but though this is so and though no conclusive deduction against the innocence of the 1st

accused can be drawn from the finding of Material Object No. 13 in his house, still the coincidence is so remarkable as to be of real probative force, and the 1st accused has not attempted to show that he obtained Material Object No. 13 under such circumstances as to rebut any presumption that might arise from the coincidence. The fairness of the search and the finding of the articles at it is spoken to by a number of witnesses including the Village Munsif, a Village Panchayatdar and several superior officers of Police. The evidence is that the 1st accused was arrested about 1 P. M., on the 6th April, after the identification parades, that constables were at once told off to guard his house, while the superior police officers went to have their food as they had had nothing up to that time, and that the search was made with all due formality and precautions about 3 P. M. The contention for the defence is that the paper with picric acid and Material Object No. 13 may have been introduced into the house in this interval. It is certainly to be regretted that the superior officer of police did not instantly go to search the house when 1st accused was identified, and thus leave no room for the plea that is now put forward ; but, in point of fact, there is no evidence to support the suggestion of the defence and no reason to suppose that it is true. The house was in the occupation at the time of the 1st accused's father and mother and mother's sister; and 1st accused signed the search list himself and did not then make any complaint that the things had been foisted on him. It is unlikely that if the police desired to fabricate evidence they would have chosen picric acid as the medium, since the Inspector of Explosives had two days previously (Exhibit B) laid it down definitely as his opinion that picric acid was not the explosive used, and it was not until the 18th April, (*i. e.*, twelve days after the search) that the pieces of paper (Material Object No. 8) found in the bomb were discovered to be part of the Congress Report of 1894. It is, however, argued with truth that the evidence of the Sub-Magistrate who had possession of the articles found at the search until they were sent to the Chemical Examiner is not altogether clear as to the paper said to contain picric acid, and the person who actually packed and sealed the articles for despatch to the Chemical Examiner has not been called as a witness. This leaves room for the argument that it is possible that the "pieces of paper stained with yellow

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powder" which form item No. 10 in the Chemical Examiner's list (Exhibit D) and which he certified were "stained with picric acid," may not be the very pieces of paper found in the search containing a pinch of yellow powder, and which the Sub-Magistrate believed were sent to the Chemical Examiner as No. 10 in the Magistrate's list (Exhibit W) which runs "Yellow powder with newspaper containing it and stitched paper pouch." I think that the person who actually packed and sealed the articles for despatch should have been called and, in his absence, I think we ought not to regard it as strictly proved that picric acid was found at the search. But this flaw does not affect Material Object No. 13 which was never sent to the Chemical Examiner at all, but remained with the Magistrate. The powder in Material Object No. 13 was sent and was found to be harmless, but Material Object No. 13 itself was not sent. The conclusion I arrive at in regard to Material Object No. 13 is that it was, in fact, found in the 1st accused's house at the search, as alleged by the prosecution, and was not foisted on him by the police or through their agency. The fact, however, does not carry the case much further than it was carried by the finding that the material portion of the bomb (Material Objects Nos. 3, 2 and 9) was made for the 1st accused and was traced to his possession and that he gave no explanation to show that his possession was innocent. It is argued that the 1st accused is an ignorant ryot, who would be most unlikely to be engaged in making bombs. There is little or nothing on record regarding the man's antecedents except that he is described as a small cultivator. He writes a good running hand in Telugu, but does not appear to know English. There is nothing in these facts to render his guilt so improbable as to make it incredible that the direct evidence against him is true.

The facts, then, that are proved are that the 1st accused got a blacksmith to make the iron arch, which is a material and essential feature of the bomb, some ten days before the explosion; that when questioned, at the time of procuring it, the 1st accused gave a false name and address, and falsely stated that it was required for the purpose of distillation; that ten days after the iron arch was procured by the 1st accused, it formed part of a bomb which was buried in a frequented foot-path between two villages

and which exploded and killed Chennugadu; that some of the papers used in making the bomb were portions of page 14 of the National Congress Report of 1894, and a portion of page 14 of the National Congress Report of 1894 was also found in the 1st accused's house some ten days after the explosion; that 1st accused gives no explanation at all in regard to these facts, but simply denies their truth. I think that the reasonable inference from these facts is that the 1st accused is guilty of the several offences charged against him. The *mens rea*, or guilty knowledge, of the man from the first is shown by his giving a false name and address and by his false statement as to the purpose for which he required the iron arch. He makes no attempt to show that he got the iron arch made innocently, or that it left his possession under circumstances indicative of, or consistent with, his innocence. Why he got the iron arch made and how it left his possession are matters which must be "especially within his knowledge," and the burden of proving them therefore lies on him under S. 106 of the Indian Evidence Act; and under S. 114 of the same Act, the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, and human conduct in their relation to the facts of the particular case [see illustration (*h*) and S. 342, Criminal Procedure Code]. The illustration to S. 106 says that when a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him. Now when a person gets an essential part of a bomb made and at the same time makes false statements as to his name and the purpose for which he is having it made, the character and circumstances of his act suggest that he is getting it made with the intention of using it for the manufcture of a bomb, and when we find that it is, in fact, used a few days afterwards for the manufacture of a bomb, and the person who had it made and in whose possession it was, gives no explanation as to how it came to be so used, and does not show that it was so used without his knowledge or against his will, I think the reasonable and natural inference is that such person himself made the bomb or caused it to be made by some other person.

It is true there is no eye-witness in the present case to the making of the bomb or to its burial in the path, nor is there

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mathematical proof that it was made and placed there by the 1st accused; but the law does not require such proof. Under the Indian Evidence Act, S. 3, " a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act on the supposition that it exists." The facts proved in this case lead me clearly to the belief that the 1st accused either himself made the bomb and buried it in the path where it exploded, or caused it to be made and buried there by some other person, and in either case he is equally guilty on the principle *qui facit per alium facit per se.*

If a person buries a bomb in a frequented path where it is almost certain to be trodden on and to explode and cause the death of any one treading on it, and if it does, in fact, explode and cause death, that person is guilty of murder unless he can explain his action in such a way as to negative the inference as to his intention which the nature and circumstances of the act suggest.

It is not at all necessary that he should intend to cause the death of any particular person. For example "if a person, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them, he is guilty of murder although he may not have had a premeditated design to kill any particular individual." [Indian Penal Code, S. 300, Illustration (*d*)].

I do not think there is any reason to suppose that the deceased was engaged in digging the hole in order to bury the bomb and had taken on himself the risk of doing so and was blown up by his own incautious act. The bomb was evidently in a pit when it exploded and the sides of the pit bore marks of having been dug by a crow-bar, but no crow-bar was found there as it would have been if the deceased had been burying the bomb at the time. There is nothing to suggest that there were other people with deceased at the time who removed the crow-bar. If there had been such, they would hardly have escaped injury in the explosion and they would surely have removed the broken pieces of the bomb if they thought it worth while to remove the crow-bar. The circumstances suggest that the deceased, walking on the path in the early morning, saw the

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end of the tin tube sticking up out of the ground where the bomb had been buried and stooped down to feel it or pick it up and thereby caused it to explode. The fact that the body was found above 15 yards from the spot does not suggest to me that it was carried there by other persons. It is well known that persons and animals shot through the heart do often go some distance before falling.

In my opinion the 1st accused has been rightly convicted of murder, and also of the minor offences under the Explosives Act. It is true no motive for the murder has been shown but that does not lessen the accused's guilt. For aught that appears he may have designed to kill some particular person, or he may have acted out of mere recklessness and from curiosity to see the effect that would be produced by the explosion, but that would make no difference in his guilt. I find no extenuating circumstances proved. I would therefore confirm the sentence of death passed by the Sessions Judge, but as my learned brother takes a different view the case will be laid before another Judge for decision under S. 378, Criminal Procedure Code. No separate sentences for the offences under the Explosives Act are, in the circumstances, necessary.

Abdur Rahim J:—The prisoner Chukkapalli Ramayya has been found guilty by the Additional Sessions Judge, Guntur Division, differing from the Assessors, of an offence under S. 302, Indian Penal Code, having caused the death of one Chennugadu under circumstances which made accused guilty of murder, under S. 3 Explosive Substances Act VI of 1908 for unlawfully and maliciously causing by an explosive substance an explosion likely to endanger life or property, and under S. 5 of the same Act for having knowingly in his possession an explosive substance under circumstances giving rise to a reasonable suspicion that he had it for an unlawful object. Under S. 302, Indian Penal Code, the Judge has passed the sentence of death on the prisoner. Under S. 3 of the Explosive Substances Act, the sentence awarded is transportation for life and under S. 5 of the same Act transportation for ten years.

The dead body of Chennugadu was found on the 27th March last in the morning lying across the Nandivelugu channel and from the nature of the injuries observable on the corpse and

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the evident traces of a recent explosion on the spot there can be no doubt that the death of the unfortunate man was caused by the explosion of some sort of explosive machine. The body bore marks of burning on the face, chest and arms, and had on it considerable lacerated wounds the edges of some of which were burned; the left arm was shattered, some of the ribs were exposed and the heart punctured. One of the wounds was soiled with mud and from it the Surgeon extracted a piece of iron. About 15 yards from the corpse, in a cattle track which is used as a footpath running along the bund of the channel from Nandivelugu to Tenali, there was a pit 1 foot 1 inch deep and 1 foot 1 inch in diameter and the earth round its mouth was discoloured. In the pit lay a round piece of iron with a nipple on it and another round piece of iron not far off, and these two along with a third piece of iron found on the 8th April formed when put together a sort of arch with a nipple on the top something like this . There was a tin tube lying near the pit with its lid lying separate from it and round the pit there were pieces of a broken soda water bottle, rags, bits of paper, pieces of iron and on the bund an iron disc. Near the pit was also found a blood-stained cloth and blood stains on the ground, and blood was also found on the bund at a point near the corpse.

Captain Rush, Inspector of Explosives, who arrived at the scene on the 3rd April, says that he was shown the above objects (with the exception, of course, of the iron piece found later) and that they smelt of exploded matter. In the opinion of the Chemical Analyser to the Government, who detected arsenic and obtained Chlorate reaction in all the objects, the explosive probably consisted of Chlorate of Potash mixed with Sulphide of Arsenic and containing the fragments of a soda water bottle, the whole being placed in a round ended tin. Captain Rush gives it as his opinion that the iron arch formed a leading part of the explosive and the tin tube which had a hole at the bottom fitting the nipple on the arch was an essential part of the machinery which he thinks was buried in the ground with a portion of the tube projecting above the ground. He also says that the tube might have contained a loose rod to keep it upright, and supposing there was sensitive explosive at the bottom and any one touched the tube

explosion would follow. In his letter written on the 4th April to the Chief Inspector of Explosives, Captain Rush states that it is somewhat difficult to reconstruct, even in imagination, a weapon of this nature after it has exploded. He also observes that while the serious nature of the injuries found on the person killed by the explosion, especially the entire separation of the bones of the left arm, point to some explosive being used, the undamaged sides of the pit on which marks of the crowbar are still visible while he would have expected more or less of a crater to have been formed there, the uninjured state of the tin tube and the size of some of the fragments of sheet iron recovered, all pointed to a low explosive, or a very small charge, if a high explosive was used. This was before the examination of the exhibits by the Chemical Examiner when Captain Rush was not aware of the nature of the explosive used, and in his evidence in Court he says that if the bomb was buried in the pit with loose earth placed all round it that would explain the absence of any damage to the sides of the pit. I may mention here that there is the evidence of the 8th prosecution witness that at sunrise on the day the dead body of Chennugadu was found he heard, when he was just outside the village of Kancherlapalam which is some distance from the scene of explosion, a loud report like that of a gun. But I am not inclined to place much reliance on his evidence. The witness says that he had heard such reports before and if the report was loud enough to be heard at Kancherlapalam, in all probability there would have been evidence forthcoming that other villagers also heard it. But whatever was the strength of the explosion the suggestion of Mr. Sundara Iyer who appeared for the prisoner that the machine might have been an ordinary bomb which is used in pyrotechnic displays is quite untenable having regard to the construction of the weapon, its composition and the place and circumstances of its explosion. I have no hesitation in accepting the opinion of Captain Rush that what caused the death of Chennugadu by its explosion was an infernal machine, *i.e.*, as I understand, a machine esigned for the destruction of human life and property.

There is no eye-witness available to tell us how the explosion was actually caused and by whom; what the deceased Chennugadu was doing then or how he came within the range

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of the bomb so as to be killed by its exploding. Chennugadu who was a Mala by caste and employed somewhere as a farm servant had left his house alone in the early morning of the day on which his dead body was found to go to Tenali in order to get a shuttle repaired. This is what his father, prosecution witness No. 6, tells us. But it should be noted here, as it seems to be a very remarkable fact, that though this witness was informed of his son's death the same evening, neither he nor any of his other sons went to see the corpse, while a number of other villagers went to see it, nor did they take any step to ascertain how Chennugadu met with his death in an open field as the result of an explosion.

Before proceeding further I would pause here to observe that from the facts narrated above, supposing there was nothing else to guide us—and as I read the evidence there is nothing else bearing on the point—it would be impossible, in my opinion, for a Court to come to any reasonably certain conclusion as to how the explosion was caused and whether the death of Chennugadu was due to crime or to accident. It is possible on the above facts to build more than one theory to explain the circumstances in which the fatal explosion occurred. And no doubt some one of those theories would appeal more strongly to one mind than another, but, left with these facts alone, we are more or less in the region of conjectures. Yet it is necessary to dwell on the various suggestions which they convey to one's mind in connection with the question how far the charges under S. 302, Indian Penal Code, and under S. 3 of the Explosive Substances Act, can be said to have been proved. What probably was the nature of the explosive machine would indicate that whoever constructed it had for his object the furtherance of murderous designs either for anarchical or seditious purposes or to wreak vengeance on enemies. The machine on the other hand was placed in the midst of fields a considerable distance from the nearest human habitation, and there is no evidence to show that any person whom an anarchist or seditionist was likely to mark out as his victim was expected to pass over the place where the explosion took place. Similarly, in the absence of any evidence to show that the unfortunate man who was killed or any other person in the neighbourhood had an enemy

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who was likely to have compassed his death and to have employed a bomb for the purpose, I should not feel myself at liberty to infer that the infernal machine was used with the intention of killing any particular human being. On the other hand, the place and time of the explosion which must have occurred very early in the morning, if not earlier still, might fairly be taken to show that whoever wanted to cause the explosion intended to conceal the fact from the knowledge of others and perhaps also to guard against causing injury to human life or property. What seems to be probable is that some person or persons were experimenting with the machine to see how it would act. But the learned Sessions Judge infers from the fact that the hole in which the machine exploded was dug in a foot-path in the fields shows that the machine was planted there either with the intent that whoever passed that way and happened to tread on the projecting tube or touched it out of curiosity should be killed or in utter recklessness as to how dangerons it might prove to the life of people passing along the path. The theory of the bomb being placed where it eventually exploded from sheer carelessness or reeklessness as to the consequences seems to be untenable, for it is hardly likely that any one who took the risk and trouble of making an infernal machine like this containing explosives of a highly sensitive character, and carried it right into the fields in order to plant it there, should not have done so with some definite object in view. The author of the machine could hardly be supposed under the circumstances to have planted the bomb where it exploded without intending to cause an explosion, being content to leave it there or careless as to what might happen to it. I think there can be no doubt that whoever took the machine to the place did so with the intention of causing an explosion. Now is it likely that the object of the man in causing an explosion was to destroy human life either to test the efficiency of the invention or from a wanton desire to kill human beings? If that were so, where was the necessity to go so far away from the villages while the man could have accomplished either of these objects more satisfactorily to himself by placing the machine in some frequented place in or near one of the villages. What as I have said, seems to be more probable is that the explosion occurred in the course of an experiment with the machine. The next question

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which one has to ask himself is: what was the deceased doing at the scene of the explosion? The evidence of his father is that he left the house to go to Tenali in order to get a shuttle repaired. I have already pointed out how strange was the conduct of the deceased's father and brothers in not showing the least concern on hearing of the man's death in such unusual circumstances. Another noteworthy fact in connection with the evidence of Chennugadu's father is that though the scene of occurrence was carefully and minutely searched for days together, and we have a list of all the articles found there, no shuttle appears to have been found. Yet in all probability Chennugadu, an illiterate Mala, was not likely to have been interested in the manufacture of bomb and experimenting with them. That, however, does not preclude the possibility that he might have been helping other persons, either for hire or without hire, at the time of the experiment, if not also at an earlier stage. That other persons were present at the time seems to be more than probable. The hole, when first seen, still bore marks of the crowbar but no crowbar was found on the spot. The deceased was lying in the channel some yards from the pit while one of his clothes lay near the pit; and it is extremely unlikely, if not impossible, having regard to the terrible nature of the injuries inflicted on the deceased, including puncture of the heart, that death should not have been instantaneous or that he should have been able—supposing he was not killed at once—to walk or crawl across to the place where he was found. This also points to other men being present, and if Chennugadu's death was due to an accident and not the result of a premeditated design, the men that were there were likely to have carried him to the channel in which there was then some water and tried to revive him. It might be asked that if this was what took place, how is it that the men who were on the scene did not inform the relatives of the deceased of what had happened? But one would not ordinarily expect people concerned in making such an experiment, as the argument supposes, to disclose their identity and run the risk of a prosecution under the Explosive Substances Act. Most of the injuries on the deceased were on the face, hands and the chest, and that would go to show that in all probability the deceased was near the machine and facing it, either in the act of fixing it

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in position or igniting it, when the explosion occurred. The explosive being of a highly sensitive nature, any negligence in handling the bomb was likely to make it explode. The absence practically of injuries on the legs goes against the suggestion that the man might have unknowingly trodden on the projecting tube, and if, as seems to be probable, there were men engaged in making an experiment they would not have allowed an unwary passer-by to handle it. The fact that the hole for planting the machine was dug in a foot track, which, it must also be remembered, is in the midst of fields, to my mind proves nothing, for an experiment such as this was not likely to occupy much time, and the men engaged in the experiment would be there to warn unwary travellers. All the facts to my mind point to the deceased being one of the party of men engaged in testing the power of the explosive machine, though probably he himself had nothing to do with its manufacture, nor was privy to the ultimate criminal purpose which, we may reasonably assume, the invention was designed to subserve, though not on the particular occasion. It is not possible to argue much further from the circumstantial evidence available at the place of explosion. For instance, whether the deceased, supposing he was handling the machine in the course of an experiment, was fully warned of the risk he was running or he was not properly warned, or whether, being warned of the danger, he was negligent in following his instructions, it is difficult to say.

I now come to the evidence by which the prosecution seeks to connect the accused with the explosion and the death of Chennugadu. The prisoner, who is a Kamma, was originally tried with two young Brahmins, Lakkaraju Basavayya and Kotamraju Venkatarayudu, upon the same charges. The evidence against these latter was that these two young men who were friends, and one of whom was proprietor of Swadeshi stores in the village of Tenali, had got made the tin tube which was found on the scene of occurrence, and that they had been circulating seditious leaflets which, among other things, inculcated the manufacture of bomb for the purpose of killing 'the enemies,' meaning thereby English people in India. The Sessions Judge was not satisfied with the evidence that the tube in question was made at the instance of the two Brahmans, and therefore

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rightly acquitted them. I may, however, mention that they have been subsequently tried and convicted on the charge of circulating seditious leaflets and the convictions have been upheld by this Court. The present accused is an ordinary cultivator, can read and write Telugu but does not know English; and it is not shown that he has been in any way connected with seditious movements or has ever concerned himself with any form of politics. The evidence on which he has been found guilty by the Sessions Judge of the charges preferred against him is thus summed up: "I hold it proved that he got the iron arch (Material Objects Nos. 2, 3 and 9) made by Prosecution Witness No. 11 a fortnight or so before the explosion, that he had picric acid in his house when it was searched a few days after the explosion, and that in his house was found a piece of paper from the same volume from which many scraps of paper which were in the bomb were taken." I wish to deal very briefly with the evidence relating to the making of the iron arch as I agree in the finding of the Sessions Judge on this point. [The learned judge then discusses the evidence and states:—] As regards the search of the prisoner's house, the facts are these. He was arrested at 1 P.M., and two constables were then despatched to watch his house. The search did not take place until 3 P. M., and in the meantime the accused was in custody somewhere else and the other inmates of the house had been removed. The house is a small hut with its main door facing the street. This door at the time of search was found to be open and neither of the two constables has been examined, so that we do not know at what points they were stationed and with what vigilance they did their duty in guarding the house. The evidence in the case does not enable me to say with any degree of certainty that during these two hours any one who wanted to do so could not have entered the house unobserved. As remarked by the Sessions Judge the delay is to be regretted, though I have no doubt that the explanation given for it, namely, that the officers engaged in the investigation were tired and wanted to refresh themselves, is quite *bona fide* so far as it goes. But why after they had time to refresh themselves, the superior Police officers, I mean the Deputy Superintendent of Police and the Sub-Magistrate, were not present at the search when it took place, is not explained. It strikes one that, considering the explosion occurred ten days previously and a large body of the

Police force were actively engaged in making investigations in the villages, it was hardly to be expected that the accused, supposing he was concerned in manufacturing the bomb, would have left incriminating evidence in his house, and it is not unlikely that the Police officers themselves might have taken that view. That was possibly another reason why the search did not take place immediately after the arrest. The case of the prosecution is that two small paper packets were found tied at two corners of a cloth which was on a pole in the very first room as one enters the hut from the main door. In one packet there was some violet tooth powder, but the paper, Material Object No. 13, which contained this powder is from a page in a Congress Report of the year from which some of the bits of paper found at the scene of explosion having been apparently used in the composition of the bomb, were also taken. It should not, however, be understood that Material Object No. 13 and the bits of paper found on the scene are from one and the same identical book. The paper of the other packet is of no evidentiary value, but it is alleged to have contained picric acid, a stuff which has been generally used in the making of bombs in this country. As regards the piece of paper (Material Object No. 13) it must be remembered that the accused does not know English and there is no suggestion that any other inmate of his house knows English. No English book, or newspaper, or any other paper containing writing in English was found at the search, so that the accused was not likely to have a Congress Report in his house. Any portions of a page in a Congress report that might have found their way there, must, therefore, have been brought in as waste paper. And if such a piece of paper was available to the accused, is it unlikely that there might have been more such papers in the village? On the other hand it is in accordance with our common experience that, with the exception of a few copies which might be preserved in libraries, the Congress Report of 1894 would, like most of such literature having a more or less temporary interest, be ultimately treated as waste paper, and it would be nothing surprising if pages from such reports found their way into remote villages, being used as wrappers or in various other ways. Further, we know that several bits of paper which formed parts of the Congress Report for the same

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year were found at the scene of explosion, and if Material Object No 13 had been sent to the Chemical Examiner we would have known if it bore traces of the explosion or not, and thus be certain that it was not found on the scene but this unfortunately was not done The reason given for not sending this piece of paper while everything else was sent is that the Police wanted to find out where that paper came from. It is possible that this action of the Inspector was *bona fide*, but one cannot help remarking that his object would have been equally served if he had copied the printed matter in Material Object No. 13 and sent up the Exhibit for examination, making a special request to the Chemical Examiner to return it to him after examination if that was necessary. However that may be, the argument of the Sessions Judge based on the difficulty of procuring such a paper so as to preclude the possibility of its being introduced in the accused's house can have no weight in these circumstances. I may also say that, even if I was satisfied that possession of Material Object No. 13 was traced to the accused, I should not think that it advanced the case of the prosecution to any appreciable extent.

As to the alleged finding of picric acid at the search, that has not been proved at all. The case of the prosecution is that the yellow powder found in the other packet was picric acid. But the report of the Chemical Examiner does not show that he received any such powder. All that it states is that picric acid was detected in certain pieces of paper. There is no proof that those pieces of paper were found at the search. No initials were put on the papers containing the yellow powder, and the man who packed the exhibits in order to send them to the Chemical Examiner has not been examined. And it appears from the report that besides the object found at the search or on the scene of explosion many other objects were sent in the same parcel to the Chemical Examiner. It also appears that the objects sent were not exclusively in the custody of the Sub-Magistrate—and on this point the Sessions Judge has apparently misread the evidence—or of any other equally responsible officer until their despatch. The law makes the contents of a report of a Chemical Analyst to the Government evidence, and dispenses with the necessity of examining the expert as a witness in the case. But

such report can be of no use unless there is proof of the identity of articles found during investigation and sent to the Chemical Examiner with the articles examined by him. The Sessions Judge argues that if the Police wanted to foist any incriminating substance on the accused they would not have chosen picric acid, as no picric acid was found in the composition of the bomb. But it must be remembered that it was the duty of the prosecution to prove their allegations by means of sufficient and reliable evidence, and if the evidence of the prosecution is neither satisfactory nor conclusive that defect cannot be cured by the fact that the accused is unable to make out positively that such evidence is false and has been manufactured by any particular person or persons interested in the prosecution. The Court trying a case is not ordinarily in a position when it must either pronounce a particular piece of evidence to be false and fabricated or act upon it. And in a criminal trial, even if the evidence in support of a charge is in fact false, it would more often than not be impossible for an accused person on his trial to show how it came to be fabricated. I have been constrained to make these general observations, especially as the learned Counsel who appeared for the Crown, on more than one occasion, in the course of his argument, seemed to assume that there was no alternative for us but either to accept the case of the prosecution as regards the finding of Material Object No. 13 and the picric acid as proved or to find that the Police officers concocted the evidence on the point. In my opinion, we are faced with no such dfficulty as will be obvious from what I have already said. I may also point out that the reasoning of the Sessions Judge with reference to picric acid being found at the search is based on a misappreciation of the evidence. He assumes that it was known at Tenali at the time of the search that picric acid was not an ingredient in the composition of the bomb. But the evidence does not bear this out. It is true that Captain Rush, in a letter written by him on the 4th April to the Chief Inspector of Explosives at Simla stated as his opinion that the discoloration of the pit was not caused by picric acid. But it is not shown that Captain Rush's opinion was known to any one at Tenali. And the Chemical Analyst made his report long after the search. I am unable to find that the accused is proved to have been in possession of Material Object No. 13 or picric acid.

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The whole case, therefore, against the prisoner is that he had the iron arch made a fortnight before the occurrence. It was used as an important part of the machine and at the blacksmith's shop he had given a false name and stated that it was wanted for distilling medicine, which has not been made out. The explosive machine, in the construction of which the arch was actually utilised, is such as is generally used for the destruction of human life and property. At his trial the prisoner denied having had anything to do with the iron implement, and consequently we have no explanation from him as to what he did with it or how it came to be used in the bomb.

By section 2 of the Explosive Substances Act which defines 'explosive substance' as 'any apparatus, machine, implement or material used in causing an explosion or any part of such apparatus', &c., the iron arch becomes an explosive substance and there can be no doubt that the prisoner knowingly got it made under circumstances which afford reasonable grounds for suspicion that he got it made for an unlawful object. He has thus committed an offence under S. 5 of the Act. Under this section it is not necessary to come to any more definite finding than that the accused had possession of the explosive substances under suspicious circumstances and the possibility, which I have suggested elsewhere, that the particular explosion might have been caused in the course of an experiment, is not inconsistent with such finding. In this connection I might observe that the iron arch might have been expected to serve for a future unlawful purpose; that it happened to be broken by the explosion appears to have been more or less an accident. The other section of the Act under which the accused has been convicted is S. 3. That makes it an offence more severely punishable than an offence under S. 3 for a person 'to unlawfully and maliciously cause an explosion by an explosive substance of a nature likely to endanger life or to cause serious injury to property.' The gist of this section is the causing an explosion unlawfully and maliciously which must be proved in the ordinary way. Suspicion would not suffice as in a case under S. 5, and if possession of an explosive under circumstances mentioned in the later section were sufficient for the purposes of S. 3, the legislature would have said somewhat to this effect :—"Whoever makes or

knowingly has in his possession an explosive substance in the circumstances mentioned in S. 5 and an explosion occurs or is caused by such substance, shall be guilty of unlawfully and maliciously causing an explosion,&c." There is no evidence, direct or circumstantial, to show that the prisoner caused the explosion.

The charge under S. 302, Indian Penal Code, is equally unsustainable. In convicting the prisoner under that section the Sessions Judge gives as his reasons that he has no doubt the 1st accused knowingly took part in the making of the bomb and that in all probability he placed it where it exploded with the intention of causing the death of some person or other or in utter recklessness whether it caused such death with knowledge that he was doing an imminently dangerous act. In coming to this conclusion he relies largely on the fact that the accused has not attempted to explain how the iron arch left his possession, and that being a fact peculiarly within his especial knowledge, the burden of proving it lay on him (S. 106, Indian Evidence Act). The prisoner undoubtedly failed to discharge this burden, but what follows? Does it follow that it must be presumed that it never left his possession until explosion actually occurred and hence he must have used it in the bomb and placed the bomb where it is exploded? If that were the legitimate effect of S. 106, Evidence Act, it would, I am afraid, revolutionise the methods of criminal trial, and I admit I have never known such use being made of the section. If the argument of the Sessions Judge were well founded, then if a person is found to have met his death by means of a dangerous weapon and that weapon is proved to have been in the possession of another person and the latter does not explain how he came to part with it he will be presumed to have had continuous possession and control of the weapon until it was used in killing the deceased, with the result that he would be guilty of murder unless he is able to rebut these presumptions. And this would be so apart from anything to show that the owner of the weapon had any sort of motive to kill the man or whether death was homicidal, suicidal or accidental. The very statement of the results which would follow by the application of S. 106 of the Indian Evidence Act in the way suggested by the prosecution shows that it can have no such application. The question at issue on the charge of murder in this case

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is, who caused the explosion and with what intention or knowledge and how Chennugadu came to be killed by the explosion, and not what happened to the iron arch after the accused had it manufactured. And if the accused failed to prove how he came to part with possession of the arch, that cannot relieve the prosecution of the burden of proving the essential facts which would make out a case of murder. Section 114 of the Evidence Act has also been invoked in support of this charge The most effective answer to this part of the argument is again supplied by the extravagant nature of the proposition which must be sustained if the charge of the murder be said to be proved in the circumstances of the case. For instance if the gap in the evidence of the prosecution could be supplied by raising a presumption under S. 114 of the Evidence Act, it would follow that if a person gets an implement of rather peculiar nature manufactured, trying at the same time to conceal his identity, and that instrument is found subsequently to form the leading feature of an infernal machine which explodes a fortnight after the manufacture of the implement in a path in an open field a long distance from human habitations under circumstances unknown and caused the death of a person, stranger to the man who got the implement made, the owner of the implement is guilty of murder. One might generalize still further, keeping closely to all the material and significant facts proved in the case and we should have a proposition to this effect : If any person is killed by the explosion of an explosive machine or by means of any other weapon of a like dangerous character and another person is proved to have made or been in possession, a few days before the deceased met with his death, of an article or implement forming an important part of that machine or weapon under suspicious circumstances—*e.g.*, in this case attempting to conceal his identity by giving a false name at the time the implement was manufactured—the latter would, without anything more being proved, be guilty of murder unless he is able to satisfy the Court that he did not have the article or implement made or was in possession of it for the purpose of killing the deceased or any other human being and is unable to explain how he came to part with possession of it. The words of S. 114, Evidence Act, as is abundantly clear from the illustrations appended to it, indicate that the existence of only such facts may

be presumed as are likely to have happened having regard to the common course of natural events in their relation to the facts of the particular case. Does our experience enable us to say that a man who gets made an implement of the nature of the article found in the bomb and the bomb explodes a few days afterwards in a footpath in the midst of fields killing another person, that the person must have planted it there with such intention and knowledge as would make the man's act an offence of murder? The general tenor of the facts of this case, especially when regarded in the light of the allegations of the prosecution, are so unusual and extraordinary that S. 114, Evidence Act, can have no possible application to them. Nor is there the least analogy as suggested on behalf of the prosecution, between the case of the man found in possession of goods recently stolen and such a case as this. It is in accordance with our common experience that persons found in possession of stolen goods a few days after the theft are more often than not men who themselves took part in the theft or received such goods with knowledge of their being stolen, while in a case like the present there is no experience whatever to guide us. The case *Queen Empress* v. *Sami*[1] which was one of robbery accompanied with murder, to my mind is of no use whatever in the present enquiry. The passage in the judgment in that case which is relied on is: "In cases in which murder and robbery have been shown to form parts of one transaction it has been held that recent and unexplained possession of stolen property, which would be presumptive evidence against the prisoners on the charge of robbery, was similarly evidence against them on the charge of murder." If these words be read in connection with the facts of the particular case, I have nothing to say: because, as the learned Judges themselves point out, all the facts which told against the accused pointed equally to the conclusion that he was guilty as well of the murder as of the robbery. But if put forward as an abstract proposition of law, I am not prepared to accept it without further consideration, and I may say I have never known a conviction for murder based solely on such presumptive evidence. In any case the *dictum* has no bearing on the circumstances of the present case. In my opinion, therefore, the convictions for

1. (1890) I. L. R. 13 M. 426.

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murder as well as under S. 3 of the Explosive Substances Act have nothing for their basis but mere surmises and suspicions, and I would therefore reverse those convictions but confirm the conviction under S. 5 of the Explosive Substances Act.

The Sessions Judge who held that the prisoner caused the explosion and was responsible for the death of Chennugadu passed a sentence of ten years' transportation under S. 5 of the Act. I have been unable to accept that finding and I cannot divest my mind of the impression that persons other than the accused who is a mere cultivator must have conceived the construction of the bomb and that the accused in procuring the iron arch which played a part in the construction of the machine was acting as more or less a minor agent of persons of a higher station in life and of some pretence to education. But the prisoner's conduct at the time he ordered the arch affords reasonable grounds for suspecting that he knew that the implement was wanted for making an explosive machine, and having regard to the use which has been made within recent times of such explosive machines in order to destroy life and create disturbance in the land, the case calls for a deterrent sentence. I would sentence the prisoner to undergo rigorous imprisonment for three years under S. 5 of the Explosive Substances Act.

This case coming on for hearing under the provisons of S. 378 of the Code of Criminal Procedure before the Chief Justice, his lordship delivered the following

JUDGMENT:—In this case the accused was convicted by the Sessions Judge of murder and sentenced to death, of an offence under S. 3 of the Explosive Substances Act, 1908 (Act VI of 1908) and sentenced to transporation for life, and of an offence under S. 5 of that Act and sentenced to transportation for ten years. On appeal from these convictions my learned brother Mr. Justice *Benson* was of opinion that the convictions and sentences should be confirmed. My learned brother Mr. Justice *Abdur Rahim* was of opinion that the convictions and sentences for murder and for an offence under S. 3 of the Explosive Substances Act (Act VI of 1908) should be set aside, and that the conviction under S. 5 of the Act should be confirmed and the accused sentenced to three years' rigorous imprisonment on that

conviction. The case now comes before me under S. 378 of the Code of Criminal Procedure.

On March 27th 1909, an infernal machine which had been buried in a footpath between the villages of Nandivelugu and Tenali exploded and killed a man.

The Sessions Judge held it to be proved that the accused got a small iron arch, which was an essential part of the infernal machine, made for him a fortnight or so before the explosion, that he had picric acid in his house when it was searched a few days after the explosion, and that in his house was found a piece of paper from the same volume from which scraps of paper which were in the infernal machine were taken.

On the hearing of the appeal both my learned brethren were of opinion that the evidence established that the accused had got the iron arch made as found by the Sessions Judge and they also agreed in holding that the accused gave a false name at the time he got the arch made. As regards the picric acid *Benson* J. was of opinion that it was not strictly proved that picric acid was found at the search. *Abdur Rahim* J. was of opinion that the alleged finding of the picric acid at the time of the search of the accused's house was not proved at all.

With regard to the search at which the piece of paper was found *Benson* J. held that it was in fact found at the accused's house at the search and that it was not foisted on the accused by the Police or through their agency. *Abdur Rahim* J. was not satisfied that the possession of this piece of paper was traced to the accused. I agree with *Benson* J. I see no reason to doubt the genuineness of the search or the fact that this piece of paper was found at the accused's house.

The piece of paper in question was the lower portion of a page taken from a copy of the Congress Report for 1894. The scraps of paper found at the scene of the explosion were also taken from a copy of the Congress Report for 1894. It was not shown that the piece of paper found at the house and the scraps found at the scene of the explosion were taken from the same copy of the report. The piece of paper and the scraps were taken from different parts of a copy or copies, of the Report. It is true, as stated by my learned brother *Benson* J. in his judgment, that the

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paper used in making the infernal machine formed portions of page XIV of the Congress Report for 1894 and a portion of page XIV of the Report was also found in the accused's house some ten days after the explosion. But, as pointed out by the Public Prosecutor, the copy of the Report contains two pages XIV, and the piece of paper found in the house was taken from one part of a volume and the scraps found at the scene of the explosion were taken from another part. What was proved, therefore, was that the piece of paper found at the house was taken from a copy of the Congress Report for 1894 and the scraps found at the scene of the explosion were taken from a copy of the Congress Report for 1894.

Now how does the case stand?

It was proved that the accused got made for him the iron arch and gave a false name at the time of so doing. The essence of the offence under S. 3 of the Act VI of 1908 is the unlawfully and maliciously causing by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property. The question I have to consider is—is the evidence sufficient to support the conviction of the accused for having caused the explosion which undoubtedly took place, and which resulted in a lamentable loss of life. We have the evidence as to the making of the arch. There is no evidence as to the making of the machine or any other part thereof. The evidence adduced at the trial that another portion, the tin tube, was made under the orders of the 2nd and the 3rd accused was disbelieved by the Sessions Judge and these two accused were acquitted. There is no evidence with reference to the burying of the machine. There is no evidence as to what was the immediate cause of the explosion.

The Public Prosecutor argued that, when once it was proved that the accused made (or got made) a part of the machine, a presumption arose that he caused the machine to explode. It may be that on the strength of the fact that he made a part of the machine a presumption arises that he made the whole machine. It may be that on the strength of the fact that he made the machine (assuming the fact that he made the machine to have been proved) a presumption arises that he caused it to explode. But I cannot hold that from the fact that the accused

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made a part of the machine it may reasonably and legitimately be inferred that he (alone or with others) buried the machine under conditions which rendered an explosion highly probable and that he thereby caused the explosion. I do not think the further fact that the accused gave a false name when he got the arch made (there is some evidence that he also said the arch was for distilling essence, but the blacksmith who made the arch says nothing about this) would warrant the drawing of the inference which the prosecution asks me to draw, although it is no doubt a piece of evidence of considerable importance as indicating a guilty knowledge of some sort in the mind of the accused. I do not think it is open to me to consider the evidence with regard to the alleged finding of the picric acid. If this had been proved (and the Sessions Judge was of opinion it had been proved) it would have greatly strengthened the case for the prosecution. But both my learned brethren who heard the appeal were of opinion it had not been proved.

I now come to the evidence with regard to the finding of the piece of paper in the accused's house and the scraps of paper at the scene of the explosion. This is a piece of circumstantial evidence which has to be very carefully considered. With regard to this my learned brother *Benson* J. observes: "Though no conclusive deduction against the innocence of the accused can be drawn from the finding of this piece of paper in the house, still the coincidence is so remarkable as to be of real probative force, and the 1st accused has not attempted to show that he obtained it under such circumstances as to rebut any presumption that might arise from the coincidence." If the scraps of paper found at the scene of the explosion had formed part of the identical page from which the piece of paper found at the house of the accused was torn, the coincidence would indeed have been remarkable. But not only was this not proved, but it was proved that the scraps found at the scene of the explosion came from different parts of a volume. The volume may have been the same or it may have been a different volume (there is no evidence as to this). The case for the prosecution is that the accused had in his possession a copy of the report and that he used one page of it for wrapping up the tooth-powder found in his house and other pages for making the infernal machine. Can I draw

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this inference on the evidence? There is nothing to show that the accused ever had a copy of the report in his possession. He does not appear to be able to read English and no English book or paper was found at his house. If he had any use for the report it would be as waste paper (the report was fourteen or fifteen years old) and if he was in the habit of using a copy of a Congress report as waste paper it seems to me that other persons would be equally likely (possibly, more likely) to make the same use of a copy.

As I have said, if the scraps had been shown to have been taken from the same page of the same volume the evidence that the accused had a hand in the making of the machine would have been strong. As it is, I think the circumstantial evidence is of some weight, and I cannot say that the inference which the prosecution ask me to draw with regard to this part of the case is not a reasonable one. But other inferences are open to me which, in my opinion, are equally reasonable, and which are consistent with the innocence of the accused. On the evidence with regard to this part of the case I find myself unable to hold that the only reasonable inference which I can draw is one incompatible with the innocence of the accused.

Mr. Sundara Aiyar contended that *Benson* J., in giving weight to the circumstances that the accused gave no explanation and adduced no evidence as to why he got the arch made, and as to how the piece of paper found in his house came into his possession, placed the burden on the accused. I do not agree. I think *Benson* J. was entirely justified in taking these circumstances into consideration. These circumstances, to my mind, tell against the accused. The fact that he gave no explanation as to why he got the arch made seems to me to tell strongly against him. But they do not relieve the prosecution from the obligation of adducing such affirmative evidence as leaves no room for any reasonable doubt as to whether the accused was guilty of the offences with which he was charged.

As regards the conviction for murder and the conviction under S. 3 of the Explosive Substances Act, VI of 1908, I do not think the evidence is sufficient to support the convictions and the convictions and sentences must be set aside.

Mr. Sundara Aiyar wished to argue against the propriety of the conviction under S. 5 of the Explosive Substances Act, VI of 1908. Both my learned brethren were agreed as to this, and I declined to hear argument on the question. I am of opinion that this conviction was right. As regards the sentence it may be the accused was a tool in the hands of some other person or persons whom justice has not yet overtaken. But, on the evidence I cannot take the view that he was an ignorant or an innocent tool. In these circumstances, I am not prepared to say the sentence of ten years' transportation passed by the Sessions Judge was unduly severe. The conviction under S. 5 of the Explosive Substances Act, VI of 1908, and the sentence on that conction are confirmed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice,

(*on reference owing to a difference between*)

Mr. Justice Wallis and Mr. Justice Miller.

Munisami Chetty .. Appellant*
v. (*1st Defendant*)
Maruthammal and another Respondents
(*Plff. & 2nd Defts.*).

Will—Executor—Estoppel—Adverse title to will.

An executor under a will who has accepted the office of executor and has acted as such is estopped thereby from setting up an adverse title to the property disposed of by the will.

Munisami v. Maruthamm

Appeal from the decree of the Subordinate Judge's Court of North Arcot, in O. S. No. 24 of 1906.

A. Krishnaswami Aiyar for appellant.

The Advocate General (*P. S. Sivaswami Aiyar*) for respondent.

The Court delivered the following

JUDGMENTS:—*Wallis* J:—In this case the plaintiff, who is the daughter-in-law of the deceased, sues the 1st and 2nd defendants as executors of his will. The plaintiff claims that under the will of the deceased she was entitled to be paid a proper maintenance out of the profits of a fund of Rs. 25,000 and odd disposed of by the will, and charges the defendants with certain acts of maladministration, non-payment of maintenance and refusal to keep and shew accounts, and prays among other things that the executors may be made to account and may be

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*A. S. No. 166 of 1907. 27th April 1910.

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removed; and the suit may, I think, be treated as an administration suit in which the Court is asked to take upon itself the administration of the estate and see that the provisions of the will are given effect to. One question raised is whether the plaintiff is entitled to maintenance under the will out of the fund. In my opinion she is. Under the will, Exhibit A, there was to be no delivery to her until there was issue to her and her husband, and in the meantime she and her family were to be paid maintenance out of the fund. Although the husband died after the institution of the suit, it is still open to her to adopt if she can obtain the necessary consent, and I do not think there can be said to have been a failure of issue so as to let in the residuary legatees. Under these circumstances I am of opinion that the widow has an interest sufficient to maintain the suit.

It is, however, contended by the 1st defendant that the property devised by the will was not the self-acquired property of the testator but was joint family property to which he and his brother, the plaintiff's husband, became solely entitled by survivorship on the death of the testator. The Subordinate Judge found that the properties so acquired were not joint family properties, but this finding is based on the proposition that when members of a joint family acquire property by working together without the aid of ancestral property, they are to be presumed to acquire it as co-owners and not as joint family property unless an intention to acquire it as joint family property is proved. I am, however, of opinion that the onus is the other way as laid down by *Bhashyam Ayyangar* J. in *Sudarsanam Maistri* v. *Narasimhulu Maistri*,[1] and it would, therefore, be necessary to consider whether the plaintiff has discharged the onus on her and shewn that the property was not joint family property, were it not that, in my opinion, the 1st defendant who raises the contention is estopped from raising it by having acted an executor under the will and got possession of the estate as executor.

In *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*,[2] where a son had taken out probate of his father's will which dealt with the property as the self-acquired property of the testator, and had collected assets under the authority of the probate and afterwards set up a claim that the property was joint family property which he took by survivorship, *Subrahmanya Aiyar* J.

1. (1901) I.L.R. 25 M. 149. 2. (1906) I.L.R. 29 M. 239.

observed at page 280: " In the next place no such question of title can, in point of law, be taken as presented for our decision inasmuch as the defendant having with full knowledge of all the circumstances bearing on his rights as the testator's son, accepted the office of executor, and obtained probate, and under its authority collected assets and otherwise so acted as to cause the plaintiffs to alter their position for the worse, the defendant is estopped from impeaching the will, repudiating his fiduciary position or setting up, in respect of the property dealt with by the will, any rights inconsistent with the conditions and dispositions therein. See BIGELOW on *Estoppel*, 5th Edition, page 554." Now, so far as I can recollect, the only way in which the plaintiffs in that case altered their position for the worse was by looking on and not opposing the defendant in the steps taken by him to get possession of the assets, relying on him to give effect to the provisions of the will of which he had consented to act as executor. The facts of the present case seem to me to be precisely similar. It is not suggested that the 1st defendant was ignorant of any of the circumstances bearing on his rights as the testator's son when he took upon himself the character of executor and collected assets as such. It is true that in the present case the 1st defendant has not taken out Probate, being an executor under a Hindu Will to which the Hindu Wills Act is not applicable and so entitled under S. 88 of the Probate and Administration Act to collect assets without Probate—*Shaik Moosa* v. *Shaik Essa* [1]—but this seems to me immaterial. Nor does it seem to me material whether the estate of the deceased vests in him as executor under S. 4 without probate, or he is merely in the position of a manager until he takes out probate, though I may say that the view that under S. 4 of the Probate and Administration Act the estate vests in the executor without probate which is in accordance with the last mentioned case and *Collector of Ahmedabad* v. *Savchand*,[2] and the opinion of Messrs. Phillips and Trevelyan in their "Hindu Wills Act" appears to be supported by the judgment of their Lordships delivered by *Sir Arthur Wilson* in *Mirza Karratalain Bahadur* v. *Peara Sahib*[3].

1. (1884) I.L.R. 8 B. 241.
2. (1902) I.L.R. 27 B. 140.
3. (1905) I.L.R. 33 C. 116 (P.C.)

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In the present case, as in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*[1], the 1st defendant accepted the office of executor under the will and collected the assets as executor and was allowed to do so by the beneficiaries without any opposition. What precisely they would have done if he had refused to act as executor and claimed to take by survivorship is not susceptible of proof, and, in my opinion, such a consideration does not arise here any more than in the analogous cases of a tenant setting up an adverse title against his landlord or a trustee against his *cestui-que-trust*. The principle is well explained in the passage in BIGELOW, page 554, referred to by *Sir Subrahmanya Aiyar*: "We have now to call attention to some cases of estoppel akin to those already considered in which, however, there is no contract or in which there may be no contract, giving to the party estopped the right of possession. Still, it will be found, that the view taken of the situation is that the taking possession is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the possession was derived. The cases referred to are successions *post mortem*, that is, estates devolving by testacy or intestacy upon the persons taking possession."

" It is also a general principle of law that an executor or administrator of property, into possession of which he has been let under the Will or Letters of Administration, is like a tenant, estopped while he continues in possession from disputing the title of his testator or intestate. And this is true even of the widow of such representative of the estate when claiming under a title of her husband. The property must be surrendered and administration abandoned before the estoppel is removed."

Later on under the heading of Quasi-Estoppels the learned author deals with Election and Inconsistent Positions generally, and observes at page 683 :—

" Upon a principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped, by claiming under it, to attack any of its provisions. The same is to be said, on still stronger grounds, of the trustee ; and, in general, persons accepting and holding lawful posts of duty are similarly

1. (1905) I.L.R. 29 M. 239.

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estopped while holding the post, or while retaining the emoluments or benefits of it."

As regards trustees the principle is embodied in S. 14 of the Indian Trusts Act, and it is well settled that an executor is, for most purposes, in the position of a trustee as observed by *Kay* J. in *In re Marsden* [1] : "Where an executor accepts that office he accepts the duties of the office and he becomes, in the language of WILLIAMS on *Executors*, a trustee in this sense: 'an executor is personally liable in equity for all breaches of the ordinary trusts which in Courts of equity are considered to arise from his office.' "—LEWIN on *Trusts*, Chapter XIII, page 266, 9th edition.

In my opinion, an executor is not at liberty to set up an adverse title to property which has come to his hands as executor any more than a trustee is entitled to set up an adverse title to property which he has taken possession of as trustee. If it were otherwise, it would be open to a dishonest executor to embarrass and delay beneficiaries seeking to render him accountable by pleading that the estate did not pass under the will of the testator. I am therefore of opinion that the 1st defendant is estopped, as in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*[2], from setting up any claim inconsistent with the conditions and dispositions of the will. No attempt was made to dispute the findings of the Subordinate Judge that the 1st defendant has been guilty of acts of maladministration and has refused maintenance, and the 2nd defendant pleads that he has been prevented from discharging his duties as executor by the 1st defendant.

On the whole I have come to the conclusion that the plaintiff, as a beneficiary, is entitled to the account prayed for against the defendants and to have their removal from the executorship and a receiver appointed to complete the administration under the supervision of the Court, and I should therefore be in favour of modifying the decree accordingly.

As my learned brother differs, we have decided to refer under S. 28 the question of law :—

Is an executor under a will who has accepted the office of executor and acted as such estopped thereby from setting up an adverse title to property disposed of by the will ?

1. (1884) L. R. 26 Ch. D. 783 at 789. 2. (1906) I. L. R. 29 M 239.

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Miller J.:—In my view of this case it is necessary first to state my reasons for concluding that the wills of Parasuraman are ineffective to dispose of the property dealt with in them.

The evidence shows that Parasuraman and his brothers, being presumably members of a joint family, and living together, borrowed Rs. 1,500 from a maternal relative and started a 'Mandi;' they conducted their business jointly for some time and then effected a partition, and after the partition, Parasuraman acquired the bulk of the property disposed of by his wills. But there is no evidence that his acquisition of this property was effected 'without detriment to' the property he received at the partition.

I do not think that Parasuraman's attestation of Exhibit I (*a*) is evidence of a nucleus of family property, nor do I think that the fact that he employed part of the capital in a business in which his sons were interested as well as himself is evidence that he intended to treat all his property as joint family property. His statements in the earlier will are evidence indicating a contrary intention. But there is nothing to rebut the defence evidence as to the original acquisition of the property, and we were not invited to find that the evidence on that point was untrue.

Mr. Krishnaswami Ayyar did not contend that the facts may not raise the presumption that the acquisitions of Parasuraman and his brothers were joint family property, but he says that, taking the question to be how did the brothers intend to hold their acquisitions, the intention is shewn by 1st defendant's conduct to have been an intention to hold the property as the separate property of partners put together for trading purposes. But, in my opinion, this is not made out. The 1st defendant's conduct is easily explained. Even if he knew that the will was inoperative, it was to his interest to profess belief in its validity and to act accordingly so long as his brother Jayavelu remained alive: his conduct, therefore, in acting as executor is of no value as evidence of consciousness that the property dealt with by the will was his father's separate property. Whether he knew it was separate or not, he would probably have acted in the same way. When Jayavelu died, it

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became the 1st defendant's interest to repudiate the will, but he did not wait for that: he had already before that event presented his written statement in this suit alleging the invalidity of the will. In these circumstances I find no evidence of any value in the 1st defendant's conduct after his father's death.

The presumption then remains that the acquisitions of Parasuraman and his brothers were joint family property in their hands. The Subordinate Judge, no doubt, puts the presumption the other way: in the absence of evidence of an intention to hold the property as joint family property he will presume that it was held as partnership property. He does not, however, support his conclusion by any authority, and he recognizes that it is contrary to the opinion expressed by *Bhashyam Ayyangar* J. in *Sudarsanam Maistri* v. *Narasimhulu Maistri*[1]. Mr. Krishnaswami Ayyar did not, as I have said, support the Subordinate Judge upon this point, and it seems to me clear that the *dictum* of *Bhahsyam Ayyangar* J. ought to be accepted as a correct exposition of the law.

The acquisitions of Parasuraman and his brothers were, therefore, joint family property and the remaining question is whether Parasuraman's sons had an interest in that property which would defeat his disposition of it by his will. Mr. Krishnaswami Ayyar cited *Jamna Prasad* v. *Ram Partap*[2] as authority for the proposition that the sons had no interest during their father's life-time, the property not being 'ancestral' property, *i.e.*, derived by Parasuraman from his father. The view taken in that case is opposed to the opinion expressed by a Full Bench of this Court (*Karuppai Nachiar* v. *Sankaranarayanan Chetty*[3] to the effect that there is no joint family property in respect of which the male issue of the joint owners will not by birth become joint owners with their father—and this opinion accords with that expressed by *Beaman* J. in *Karsondas Dharmsey* v. *Gangabai*[4].

And even if the sons were born before the acquisition it seems to me easier to hold that in the absence of evidence to the contrary the acquisition is made for them as well as for their

1. (1901) I.L.R. 25 M. 149 at pp. 155 & 156. 2. (1907) I.L.R. 29 A. 667.
3. (1903) I.L.R. 27 M. 300 at p. 313. 4. (1908) I.L.R. 32 B. 479 at p. 496.

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fathers, than to accept the view presented by Mr. Krishnaswami Ayyar that though the sons take an interest at their father's death sufficient to prevent their exclusion by his surviving joint acquirers, they have no interest during his life. That, it seems to me, is to introduce "a species of joint family property" unknown to the Mitakshara—*Karuppai Nachiar* v. *Sankaranarayana Chetty*.[1] The Will of Parasuraman is, therefore, inoperative against the 1st defendant unless the 1st defendant is estopped from contesting its validity.

As to estoppel the facts are that the 1st defendant acted for some years as executor under the will, and the question is, whether he is entitled in the suit to repudiate it and shew that it is invalid.

In *Sreenivasa Moorthy* v. *Venkata Varada Ayyangar*,[2] the estoppel was between an executor and his co-executors, who had, *Subrahmanya Aiyar* J. held, altered their position in consequence of his acceptance of the position of executor. It does not appear from the report what they had done, but at least they had allowed him to deal with some of the property in the way of administration, which they could not have done had he not represented himself to be acting as executor.

The present is a different case. The first defendant was entitled to possession of all the estate, whether the will was good or not: had he at the outset said "the appointment of executor is a mere nullity, but I am managing member of the family and as such take over the estate," Jayavelu and the plaintiff could not have resisted him.

The difference is clear: there is a practically irresistible presumption that the co-executors of the defendants in *Sreenivasamoorthy* v. *Venkata Varada Aiyangar*[2] would not have allowed him to take possession of the estate but for his conduct in accepting the position of executor: there is no such strong presumption in the present case.

In other words it is not clear in this case, as it was in that, that the executor was let into possession under the will, and, unless that is found, the principle enunciated in BIGELOW on *Estoppel* at page 554 does not apply.

1. (1905) I. L. R. 27 M. 390 at 313. 2. (1906) I. L. R. 29 M. 239.

Consequently it seems to me that the estoppel in the present case can rest only upon the ground on which Mr. Krishnaswami Ayyar put it, that the 1st defendant's conduct has induced the beneficiaries under the will to alter their position. The plaintiff's position cannot have been altered: it must have remained precisely the same whether the 1st defendant administered the estate as executor or as manager of the family: she might have contested his position earlier than she has done, but that is all.

But Jayavelu might have called for a partition, and, by a partition, might have secured for himself and his wife a better position than that given them by the will, and if I could find a scintilla of evidence to indicate that he refrained from demanding a partition in consequence of his brother's conduct, I should unhesitatingly hold the 1st defendant estopped from setting up what on the evidence is the true position under Hindu Law. But such evidence as there is seems to point the other way. Jayavelu lived separately from his brother after his father's death so long as he was on good terms with his wife, but when he quarrelled with her he went to live with his brother (1st defendant). There is nothing to suggest that he was likely to demand a partition in his wife's interest; he lived for some time after the institution of the suit, but he did not join in it, or make any attempt, after his brother had repudiated the will, to obtain his share of the property by a partition.

I am unable, therefore, to hold that there is any estoppel in this case, and the plaintiff is not entitled to anything more than the Hindu Law would have given her, had Parasuraman died intestate. In my opinion, the appeal should be allowed and the suit should, therefore, be dismissed with costs. But, as my learned brother differs, that will not be the order of the Court. I would like to add that, if the plaintiff is entitled to rely on the will, I agree that she has sufficient interest to maintain the suit and that the suit may be treated as a suit for administration: in that case the order proposed by my learned brother will be the order which we ought to make in the circumstances.

This case came on before the Honourable the Chief Justice † on the question of law referred under S. 28 of the Code.

† 25th January, 1910.

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A. Krishnaswami Aiyar for appellant.

The Advocate-General (P.S. Sivaswami Aiyar) for respondent.

A. Krishnaswami Aiyar:—The question before the Court is whether Munuswami Chetty is estopped from disputing the validity of the will of his father by acting as executor. Such an estoppel could arise only by Munuswami Chetty "taking possession of the property" in and by virtue of the instrument. A person already in possession of family property cannot be said to take possession. (CASPERSZ, pp. 74, 75.) And when there is no taking of possession there is no estoppel. [BIGELOW p. 522; *Sergeant* v. *Nash*[1] (case of landlord and tenant)]. The estoppel which arises by a person taking under an instrument is really a branch of the Law of Estoppel *in pais* (see BIGELOW). It is the obtaining of a benefit which the party would not otherwise have got that constitutes the gist of the estoppel (*Rup Chand* v. *Sarveswar*[2] wherein the English cases of *Board* v. *Board*[3], *Dalton* v. *Fitzgerald*[4] are considered). The mere assertion of a particular title cannot give rise to any estoppel—*Har Shankar* v. *Lal Raghwraj*[5]; L. P. A. 87 of 1908 reversing *Avayambal* v. *Kamalamba*[6] (case of succession certificate).

If Munuswami Chetty has not taken possession under the will, the only question is whether there was any alteration in the position of others by reason of the conduct of Munuswmi Chetty. Both the learned Judges are agreed that from the evidence no alteration of position is proved. Alteration of position cannot be presumed. It is a matter of strict proof: *In re Lewis, Lewis* v. *Lewis*[7]. The case of *Sreenivasa Moorthy* v. *Venkata Varada Aiyangar*[8] relied on by Mr. Justice *Wallis* is clearly distinguishable as there is an express finding of alteration of position (see Judgment of Subordinate Judge.) Assuming that Munuswami Chetty has taken possession under the will, even then it is submitted that Munuswami Chetty is not estopped from disputing the validity of the will. Even in cases where a person has taken possession under an instrument a distinction has been drawn in English cases between a case where the instrument is inoperative because of defective title in the settlor, or the testa-

1. (1903) 2 K. B. 303.
2. (1906) I. L. R. 33 C. 915.
3. (1873) L R. Q. B 48.
4. (1897) 2 Ch. 86.
5. (1907) I. L. R. 29 A 519 (P.C.)
6. (1908) 19 M. L. J. 65.
7. (1804) 2. Ch. 656.
8. (1905) I. L. R. 29, M. 239.

tor, and a case of want of testamentary power. See *Paine* v. *Jones*[1] and *In re Anderson*: *Peglerr* v. *Gillatt* [2]. In the case of ancestral property the will is invalid not because the testator has no title to the ancestral property, but because ancestral property is not a fit subject of testamentary disposition—*Karuppai Nachiar* v. *Sankaranarayana Chetty*.[3]

[*Chief Justice*.—Even if the principle enunciated in *In re Anderson*: *Peglerr* v. *Gillatt*[2] be applicable to the case of ancestral property, does it not make a difference when the person disputing the will is not a beneficiary but one in the position of a trustee?] In *Paine* v. *Jones*[1] the tenant for life was both a trustee and beneficiary.

The Advocate General.—The law stated on the other side as to "taking of possession" is not disputed. *Rup Chand Ghosh* v. *Sarveswar*[4] lays down the correct principles, but the question is, what is the meaning of "taking possession." A change in the character of possession implies a new "taking of possession." It is to be noticed that Munuswami Chetty has associated with himself another in the administration of the estate. His acting as executor implies a new "taking possession" of the estate.

The case before your Lordship is not distinguishable from *Sreenivasa Moorthy* v. *Venkata Varada Ayyangar*[5] relied on by Mr. Justice *Wallis*. A trustee who obtains possession of the trust by virtue of his trust is estopped from disputing the title of the *cestui-que-trust*—*Newsome* v. *Flower*[6]. In administration actions the defendant is not generally permitted to attack the trusts—*Wallis* v. *Solicitor General of New Zealand*[7].

Alteration of position, if that were necessary, can be presumed under the circumstances. *In re Lewis*, *Lewis* v. *Lewis* [8] proceeds on there being no representation at all by the executor.

It is further submitted that the executor is estopped from disputing the validity of the will as Munuswamy accepted the office of executor during the lifetime of the testator. But for such an acceptance, and an implied undertaking not to dispute the validity of the will, the testator might have partitioned the properties.

Lastly as regards *In re Anderson*,[2] whether or not the principle therein laid down is applicable to the case of ancestral property, it has no application to the case of an executor taking possession under the instrument.

A. Krishnaswami Aiyar in reply:—My point as to taking of possession is really left unanswered. Munuswamy is the sole and absolute owner, and it does not matter to the plaintiff whether another is associated with him in the administration of the estate. *Wallis* v. *Solicitor General of New Zealand*[7] decides no question of estoppel. It refers only to practice in administration

1. (1874) L. R. 18 Eq 320.
2. (1905) 2 Ch. 70.
3. (1903) I.L.R. 27 M. 300.
4. (1906) I.L.R. 33 C. 915.
5. (1905) I.L.R. 29 M. 239.
6. (1861) 30 Beav. 461.
7. (1903) A. C. 173.
8. (1904) 2 Ch. 656.

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actions, especially when the Crown is the defendant. As regards implied undertaking during the life-time of the testator no such point was taken in the Courts below, and no such point is before this Court (see the referring order). The principle laid down in *In re Anderson: Peglerr* v. *Gillatt* [1] is applicable as much to the case of an executor as to a beneficiary.

The Court expressed the following

OPINION*:—The point I have to consider has been referred to me in the form of an abstract question of law and I must deal with it in that form. The question is:—Is an executor under a Will who has accepted the office of executor and acted as such estopped thereby from setting up an adverse title to property disposed of by the Will?

In my opinion the principle of the decision in *Sreenivasa Moorthy* v. *Venkata Varada Ayyangar*[2], with reference to the point in question (see page 280) applies, and I would answer the question in the affirmative. I agree with *Wallis* J. that the fact that an executor has not taken out probate (at any rate where the law does not require him to do so) is immaterial.

In the case in which this reference has been made it was contended that the executor was entitled to possession of the estate whether the Will was good or not. Assuming this to be so, I do not think it affects the question of estoppel. As I understand the facts the executor took possession *as executor* and not in the exercise of any alleged right of survivorship. I do not think it is necessary for the party who in a case of this sort relies on the estoppel to prove that he did, or refrained from doing, some specific act by reason of the fact that the executor had accepted the office and acted as such. If an executor accepts the office and acts as executor "with full knowledge of all the circumstances bearing on his rights" (see *Srinivasa Moorthy* v. *Venkata Varada Iyyangar*[2]) I think he is estopped from subsequently repudiating the Will and setting up an adverse title as against a beneficiary claiming under the will.

It seems to me (although I do not know that I am called upon to express any opinion as to this) that the special rule laid down by *Buckley* J. in *In re Anderson*: *Peglerr* v. *Gillatt*[1] does not apply to the case of an executor who has accepted office and acted as such and who afterwards claims rights by way of survivorship which, if well founded, would have entitled him to take possession.

This appeal coming on for final hearing before Mr. Justice *Wallis* and Mr. Justice *Miller*, the Court delivered the following

JUDGMENT:—The decree will be modified as proposed in our referring judgments. The appellant must pay the respondent's costs.

The memorandum of objections is allowed with costs.

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* 2nd March 1910.

1. (1905) L. R. 2 Ch. 70.
2. (1905) I. L. R. 29 M. 239.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Muhamad Husain Rowther & others	.. Appellants* (*Defts.* 1 *to* 3, 5 & 6).
v.	
Muhamad Abubakar Rowther and others	.. Respondents (*Plffs. and Defts.* 4 & 7 *to* 12.)

Right of use of tank—Customary right of user—Right of access, limitation of.

A customary right to use a tank does not necessarily involve a general right of access; it may be limited to a right of access from one or more of the four sides of the tank.

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Second appeal from the decree of the Subordinate Judge's Court of Negapatam in A. S. No. 4 of 1904 presented against the decree of the Court of the District Munsif of Negapatam in O. S. No. 84 of 1902.

This was a suit for declaration that the plaintiffs, the Mahomedan inhabitants of Karaippakkam village, were entitled to bathe in and take water from the Pallivasal Mosque tank in the village of Enangudi by a flight of wooden steps on the western side, and that defendants the Mahomedan inhabitants of Enangudi, were not entitled to obstruct the plaintiff, in the enjoyment of such right, and praying for an injunction restraining the defendants from so interfering and for reconstruction, at plaintiffs' cost, of the wooden flight of steps which had been removed by the defendants. The Secretary of State was added by the District Munsif as a party-defendant as the plaintiffs also claimed that the tank being classed as poramboke in the paimash accounts, the defendants were not entitled to obstruct the plaintiffs and other inhabitants of Karaippakkam from using the tank as set out above. Permission was obtained under S. 30, C.P.C., by plaintiffs to sue on behalf of the inhabitants of Karaippakkam village. The District Munsif decreed the suit on the ground that the tank was public property and the defendants were therefore not entitled to prevent the plaintiffs from using the tank in the manner alleged in the plaint. The Subordinate Judge on appeal held that the

* S. A. 254 of 1905. 1st March 1909.

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Secretary of State was unnecessarily joined as a party, and upheld the Munsif's decision on the ground that the tank was one attached to the Mosque at Enangudi village, that according to Mahomedan Law a Mosque and its appurtenances are open to the whole Mahomedan public, and that the defendants had no right to prevent the plaintiffs from using the tank as alleged in the plaint.

The Court made the following

ORDER :—The question whether the defendants or the Government are the owners of the tank in question was not raised in the issues; and there is no finding by the District Munsif or by the Subordinate Judge as to whether the Government or the defendants are the owners.

Before we dispose of the appeal we think that there should be an express finding as to this, and we accordingly ask the lower appellate Court to submit a finding as to whether Government or the defendants are the owners of the tank in question. Fresh evidence may be taken for the purpose of this finding.

We also ask the lower appellate Court to submit a finding on the question whether the plaintiffs have a customary right to use the tank for the purpose of bathing and washing and taking water therefrom and of obtaining access thereto by means of steps upon the western side. As regards this issue both sides will be at liberty to call any witnesses they have already examined, but no fresh witnesses may be called.

The findings should be submitted within two months after the re-opening of the lower appellate Court.

Seven days will be allowed for filing objections.

In compliance with the above order the Subordinate Judge submitted the following

FINDINGS :—The Subordinate Judge after discussing the oral and documentary evidence observed :—They establish these points in favour of the Government, *viz.*—(1) the tank is the property of the Government; (2) the mosque at Enangudi has only the right of fishery therein, but has no proprietary right over the tank, and (3) the tank is dedicated to the use of the public in general for purposes of bathing, taking water and washing clothes;

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The next point to be determined is whether the defendants other than No. 12 have acquired by virtue of long occupation a title to the tank to the exclusion of the Government by limitation and prescription. The defendants, except No. 12, relied on three acts of theirs as conclusively establishing their title by prescription, *viz*., (1) fishing, (2) repairing the tank and its conservancy, and (3) bathing and taking water. In my opinion none of these acts would establish adverse occupation as against Government. It is clear law that the right of fishery may be granted separately from the right to the soil itself and that the mere act of fishing in a tank is no proof of ownership—*vide Syed Ertoza Hossein* v. *Huree Pershad Singh*[1]; *Forbes* v. *Meer Mahomed Hossein*[2]; *Radhe Mohun Mundul* v. *Neel Madhub Mundul*[3]; *David* v. *Girish Chunder Guha*[4]. In *Syed Ertozah Hossein* v. *Huree Pershad Singh*[1] it is observed that the mere act of fishing in a tank is no proof of ownership, for nothing is more common than, in this country, for parties to fish in tanks over which they exercise no rights of ownership. In *Forbes* v. *Meer Mahomed Hossein*[2] these observations occur at page 47:—" And "that Julkur or the right of fishing may exist in India as an "incorporeal hereditament and a right to be exercised upon the "land of another is shewn by the case of *Lutchee Dossee* v. "*Khatima Beebee* reported in the second volume of the Sudder "Dewanny Adualat Reports, at page 51. In that case *A* had "purchased at a public sale by the Collector the Julkur of certain "Jheels. One of them became dry; and it was determined that "*A*'s purchase of the Julkur only, did not convey any property "in the lands which belong to the proprietor of Jheel. But the "Julkur was held, so long as the land was covered with water, "to exist as a separate right and a right belonging to the pur-"chaser." In *Radhe Mohun Mundul* v. *Neel Madhub Mundul*[3] we have this further important observation at pp. 200 and 201:—" But it appears to us, as a general question of law, "that the right to a Julkur by no means involves a right "to the soil when the Julkur is either dried or filled up by "accumulation of soil **** and as in the very case before us "grants of Julkur are usually conveyed in such terms as to

1. (1866) 5 W. R. 281.
2. (1873) 20 W. R. 44 (P.C.)
3. (1875) 24 W. R. 200.
4. (1882) I.L.R. 9 C. 183.

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"import the use and enjoyment of what may be called purely "*aqueous* rights such as fishing, gathering of rushes and other "vegetation which arise from, and are connected with water, and "it may be very well conceived that if in such cases the right "to the soil were implied in the grant of the Julkur, it would be "wholly unnecessary to specify the particular rights. We have "mentioned this, because, if the grantee were the owner of the "land, he would, as a matter of course, be entitled to everything "on it." In the present case, if there had been a grant of the tank and its soil to the mosque, it would, as a matter of course, be entitled to everything on it and it would, in that case, be wholly unnecessary to specify the particular right of fishing alone. The mention of the right of fishing alone in Exhibits E and IX implies that the grantor had reserved the proprietary right in the tank in himself. The decision in *David* v. *Girish Chunder Guha*[1] is to the same effect. I would, therefore, hold that the exercise of the right of fishing by the mosque from before the pymash time cannot vest in it any right to the bed of the tank as against the Government.

Nor can the act of repairs to the tank such as deepening it &c., &c., confer, by itself, on the defendants 1 to 8 and those whom they represent, any such title to the tank by adverse possession as that contended for by them. In *Muthaya Chetti* v. *Sivaraman Chetti*,[2] which went upon appeal to the Privy Council whose decision is reported in *Sivaraman Chetti* v. *Muthaya Chetti*,[3] the High Court held, at page 234, that from a charitable action of the nature of spending money in forming a tank and executing repairs thereto, &c., &c., no right of property in the object on which money or labour is expended accrues to the person who expends it. Again at page 235, this observation occurs :—"The evidence is certainly in favour of the "plaintiffs having taken upon themselves exclusively the "duty of clearing out the tank, but it does not follow from "this that they have acquired a right to exclude the defen- "dants." Again at page 235, this very important observation is made :—" Nor does there appear to be any authority for saying "that the construction of substantial adjuncts to the property "of another can give the constructor a right of property in such

1. (1882) I.L.R. 9 C. 183. 2. (1882) I.L.R. 6 M. 229.
3. (1888) I.L.R. 12 M. 241.

"adjuncts. Plaintiffs who were allowed to construct certain "masonry works, must be presumed to have constructed these "adjuncts to the tank by license of the original owner—the "State—for the use of the public to whom the tank is dedicated; "but this does not give plaintiffs any right to exclude others from "interfering with the conservancy of the tank generally."—At page 233, their Lordships observed thus:—"The tank is a *public* "tank, *to every part of which the public freely resort*, and the "plaintiffs have no exclusive property in the tank and could "not exclude the defendants or *the rest of the public* from the use "of it *or of any portion of it.*" The Privy Council affirmed this decision on appeal. It was the case of a dispute between the villagers themselves as to who would be entitled to execute repairs to a common tank. At page 246 of I.L.R. 12, Madras, their Lordships of the Privy Council observed that the tank was on the site of an ancient village tank and that the ancestors of the plaintiffs therein had repaired it at the beginning of the century at the request of some leading villagers. It was held that these acts of repairs extending for a very long period of time did not vest the exclusive right in the tank in the plaintiffs. In *Ambalavana* v. *The Secretary of State*,[1] relied on by the plaintiffs' pleader, their Lordships observed at page 542, in regard to an irrigation channel, as follows:—"We find, then, that the "channel is not included in the grant, and we agree with the District Judge that the plaintiff *has not had any adverse possession* "*of it as against Government so as to give him a proprietary title* "*by prescription.* The fact that the plaintiff clears the channel "and contributes labour when the channel is breached and "contributes labour to assist Government in erecting the dam "in the river each year is no proof of any proprietary right. It "is customary for landowners to contribute such labour for "ordinary repairs of irrigation works by which they benefit and "such labour may even be enforced under the provisions of the "Madras Compulsory Labour Act (I of 1858), but it by no means "indicates that the persons liable are owners or co-owners of the "irrigation works." This was, no doubt, not the case of a village tank, but was one relating to an irrigating channel and the Government also supplied the only expensive materials for the

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1. (1905) I.L.R. 28 M. 539.

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dam, *viz*, the timber required. Here, it is conceded for the 12th defendant that the Government had executed no repairs till now. It (the above decision—ED.) is, however, an authority for the position that the mere act of clearing out a tank and executing repairs thereto by the villagers would not confer a proprietary right in it on them as against the Government by reason of lapse of time. It is thus clear that the mere act of repairs to the tank, though exercised during a long period of time cannot create title by adverse occupation in the defendants aforesaid.

Nor can the ordinary acts of user of the tank by these defendants for a long series of years such as bathing and taking water create any such title by adverse possession in them as against Government or the plaintiffs. The decision in *The Municipal Board of Cawnpore* v. *Laghu*[1] following *Husain Ali* v. *Matukonan*[2] is conclusive of the point aginst the defendants. It is observed at pages 203-4 that the public rights may be limited to the inhabitants of a Manor or Township, but that within that limit they are *publici* and not *privati juris.* Similarly the dedication may be to the use of a particular body of religionists, such as the Mahomedans desiring according to their religion to use the water of the tank, and such right conveyed by such dedication cannot carry with it any restriction upon similar user by members of the community other than the defendants. At page 204 again this passage occurs:—"It has been "held, and the principle appears indisputable, that where a dedi-"cation has been established of a high road and where a portion "only out of the land so dedicated has been used for that pur-"pose, no person could by occupation or other user of any part "of the road establish a right as against the public over any "part of the land, even had it never been used for the "purpose for which it was dedicated." Again at page 250, this observation occurs:—" Now here the dedication to the "public could not be limited by invasion of any of the "members of the public, nor could they by such invasion, "however prolonged, gain for themselves a title to the land "or to the exclusive user of the land which was the subject of "the invasion. And the reason is manifest, that such user by "them was a licensed user." It would thus be seen that these

1. (1898) I.L.R. 20 A. 200. 2. (1883) I.L.R. 6 A. 39.

several acts of interference with the tank cannot establish any right in the defendants by adverse occupation as against the Government. The circumstance that the Government did not exercise any such acts would not count for anything in defendants' favour. There was never any denial of their right till after this suit was filed and even then, title by adverse possession was not set up by the defendants in their additional statements aforesaid given before the District Munsif, unless the general claim as owners be held to comprise title by limitation. In fact no issue was taken on the question of limitation in the Munsif's Court, nor does it appear that any such issue was pressed for in the High Court on Second Appeal. As to the onus of proof in such matters, I have no doubt that, upon the facts found in this case, it lay heavily on the defendants who, however, have failed to discharge the same. Exhibits E and IX, as observed already, disprove the grant of the tank to the mosque and the Settlement Register treated the tank as Government poramboke and nattam. No claim to the tank was apparently made by the defendants at the time of the recent survey and settlement. No inam title-deed was obtained, nor was any attempt made to get patta for the site in dispute. Under these circumstances, the onus of proving adverse occupation was on the defendants 1 to 8 and this was not discharged. I would, accordingly, hold that the title by adverse possession, even if it be considered as having been pleaded by defendants 1 to 8, has not been established as against the Government.

For the foregoing reasons, I would find *on the first new issue* that the Government and not the defendants are the owners of the tank in question.

Second new issue.—Upon the above finding and with reference to the declared wishes of the Government that they have no objection to the middle street people of Karaipakkam using the tank and constructing steps on the western side thereof, I must hold that the plaintiffs and others of the said middle street have the right to use the tank for the purposes mentioned in this issue and to have access thereto by means of steps on the western side. In this view, it would be unnecessary to discuss the evidence bearing on this issue and give an opinion thereon. The discussion and finding would be necessary, if the Government

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also denied the right claimed by the plaintiffs. However, as the parties would be anxious to have a finding on this issue, I would briefly discuss the matter in view to determine the question upon the evidence in the case. The right claimed by the plaintiffs is of the sort known as customary right and defined in *Palaniandi Tevan* v. *Puthirangonda Nadan*[1], in Section 2, Clause (*b*) of the Indian Easements Act, 1882, and in *Channanam Pillai* v. *Manu Pattar.*[2] No fixed period of enjoyment is laid down by law as necessary to establish a customary right. The character and length of enjoyment which are necessary for such purposes have been laid down in *Kuar Sen* v. *Mamman.*[3] On the evidence placed before me, the only reasonable conclusion that can be come to is that the plaintiffs and others of the middle street of Karaipakkam have a customary right to use the suit tank for the purposes mentioned in this issue, only by the northern and eastern ghat thereof, but that they never had access thereto by means of steps upon the western side * * The Government say they have no objection to the middle street people using the tank in any portion in any manner.

I would, therefore, hold on the new second issue that the plaintiffs are entitled to construct a flight of steps on the western side and have access thereto thereby for the purpose of bathing, washing and taking water therefrom, and that the defendants, who are only entitled like the plaintiffs to use the tank for these purposes, have no right to obstruct the plaintiffs from getting into the tank on the western side or from constructing a flight of steps thereon. (*Vide* observations appearing at page 233 of *Muthayan Chetti* v. *Sivaram Chetti.* [4]

T. Rangachariar with him *M. K. Narayanasami Aiyar*) for defendants:—There is no right of suit under S. 30, C. P. C., on behalf of the general public—*London Association of Shipowners* v. *London and India Docks*;[5] *Anundrav Bhikaji* v. *Shankar Daji*;[6] *Srinivasachari* v. *Raghavachariar*[7]; *Monmotho Nath Das* v. *Harishchandra Das*[8] and cases in Woodroffe's C. P. C., p. 513. The Sub-Judge finds a right in the general public on the 1st issue sent down and defendants have therefore no cause of action. That finding establishes a right of way to the tank on

1. (1897) I. L. R. 20 M. 389.
2. (1890) I. M. L. J. 47.
3. (1895) I.L.R. 17 A. 87.
4. (1895) I.L.R. 6 M. 229.
5. (1892) 3 Ch. D. 257. 270.
6. (1883) I. L. R. 7. B. 323.
7. (1897) I. L. R 23 M. 31.
8. (1906) I. L. R. 33. C. 905

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the western side for the general public and in suing for breach of such a right special damage must be shown—*Adamson* v. *Armugam*[1]; *Venkatachala* v. *Kuppusami*[2]; *Mahomed Alam* v. *Dibbar Khand*[3]; *Monmotha Nath Das* v. *Harish Chandra Das*[4]; *Ramphal Rai* v. *Raghunandan Prasad*[5]; *Sathuvalad Kadir* v. *Ibrahim Aga.*[6]

The plaintiffs are mere licensees from the Government and they have no right of action in their own name—*Wood* v. *Leadbitter*[7]; *Hill* v. *Tupper*[8]; *Stockport Waterworks Co.* v. *Potter*[9]; *Whaley* v. *Laing*[10]; *Heap* v. *Hartley*[11]; *Nuttal* v. *Bracewell*[12]; *Fitzgerald* v. *Firbank*[13].

In a case of injunction substantial injury must be shown. Here the defendants say that they have no objection to plaintiffs bathing on the northern side of the tank, which could be reached easily—S. 54, Specific Relief Act; Ss. 33, 24, Easements Act; *Framji* v. *Framji*[14]; *Sri Bhusan Ghose* v. *Ganesh Chunder*[15]; *Tituram Mukerji* v. *Cohen*[16]; *Boyson* v. *Deane*[17]; *Mahadev* v. *Narayan*[18]; *Hari Ganu* v. *Sakharam Balaji*[19]; *Municipal Corporation of Bombay* v. *Vasudeo*[20]; *Sabapathy Chetty* v. *Subbaray Chetti*[21].

The finding on the 1st issue that the Government is the owner of the tank is wrong. The tank is the property of the Mosque or of the village community of Enangudi—Huddleston's Papers on *Mirasi Rights*, p. 150; *vide* Ellis's Opinion that "all description of land within limits of a village belong to the Mirasidar" and Proceedings of Court of Directors that Collector had no power to grant a portion of threshing floor of village to a stranger as building site; pp. 553 & 565. Waste poramboke land ceases to be poramboke and becomes private

1. (1886) I. L. R. 9 M 463.
2. (1887) I. L. R. 11 M 42, 43
3. (1900) 5 C. W. N 286.
4. (1906) I. L. R. 33 C. 905
5. (1888) I. L. R. 10 A 398.
6. (1877) I. L. R. 2 B 457
7. (1845) 13 M. & W. 838.
8. (1863) 32 L. J. Ex. 217.
9. (1864) 31 L. J. Ex. 16.
10. (1857) 2 H. & N. 476; (1858) S. C. on appeal. 3 H. & N. 675.
11. (1889) 42 Ch. D, 461.
12. (1866) L. R. 2 Ex. 1.
13. (1897) 2 Ch 96.
14. (1905) I.L.R. 30 Bom. 319.
15. (1902) I.L.R. 29 Cal. 500.
16. (1905) I.L.R. 33 Cal. 203 (P.C.)
17. (1899) I.L.R. 22 Mad. 251.
18. (1904) 6 Bom. L. R. 123.
19. (1905) 8 Bom. L. R. 310.
20. (1904) 6 Bom. L.R. 899.
21. (1881) I.L.R. 3 M 260.

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property as soon as it is used for a particular purpose, just as a house built on Natham poramboke is private property. *See* Maclean's Standing Information ; page 117.

L. A. Govindaraghava Aiyar (with him *T. V. Gopalasami Mudaliar*) for respondents.—The Sub-Court finds that we are entitled to bathe on the northern side of the tank, and from that it follows that we have a right to bathe everywhere in the tank. The defendants cannot prevent us from so doing.

The Court delivered the following

JUDGMENT :—The finding of the Subordinate Judge upon the second issue sent down is, as we read it, a finding of a customary right in the plaintiffs to use the tank, with this limitation, that for the purpose of this use they had a right of access to the tank on the northern and eastern sides but no right of access on the western side. This being so, there is no customary right in the plaintiffs which has been infringed by the erection by the defendants of the fence on the western side.

We cannot accede to Mr. Govindaraghava Iyer's contention that the finding of a customary right to use involves a general right of access. There is no reason why a customary right should not be limited in the way, as we read the finding, the Subordinate Judge intended to limit it.

On the first issue the Judge finds that the property in the tank is in the Government and that there has been a dedication to the use of the public in general. It is not the plaintiff's case that they have any rights as members of the general public. They rely on their customary right only. In view of the finding on the second issue we must hold that the plaintiffs have failed to shew that any right of theirs has been infringed by the defendants Nos. 1 to 11 and that consequently their suit fails.

We must set aside the decrees of the lower Courts and dismiss the suit with costs throughout—one set.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Ramasamy, minor, by his next friend Mookkayi *alias* Karuppayi, & others .. Appellants* (*Plaintiffs*)

v.

Muniyandi Servai .. Respondent (*8th Defendant*).

Ramasami v. Muniyandi.

Limitation Act (XV of 1877), Art. 120—Applicability—Suit for declaration that sale and redemption of share not binding—Payment to one of several co-mortgagees—Validity of—Specific Relief Act (I of 1877), S. 42—Applicability of—Possession not capable—Consequential relief—Division, complete—Presumption of—Plea taken in second appeal.

A suit for a declaration that the sale of one pangu of Melwaram right and redemption of another pangu of Melwaram right are not binding on the plaintiffs is governed by Art. 120 of the Second Schedule to the Limitation Act (XV of 1877).

Where defendants are not in possession, the plaintiff is not entitled to further relief in the nature of possession, and his suit for a declaration of his right is not barred by S. 42 of the Specific Relief Act.

Where property is in the possession of Kudivaramdars and the Melwaram is enjoyed by periodical division of the produce, it does not necessarily follow that the owners of the Melwaram must pray for a further physical division of the property by metes and bounds.

An objection to the suit on the ground of bar by reason of S. 42 of the Specific Relief Act was not allowed to be raised for the first time in second appeal in the case before their Lordships.

Where division is admitted, the presumption of law is that it is complete.

Where a mortgage is taken by *A* on behalf of his undivided family and on *A*'s death, the mortgagor pays the entire mortgage money to one of the divided members of *A*'s family, such payment is not a valid discharge of the entire mortgage so as to affect the others having several interests in it

[*Barber Maran* v. *Ramana Goundan* [1] dissented from. *Ahinsa Bibi*; v. *Abdul Kader Sahib*[2]. *Sitaram* v. *Shridhar* [3] approved. *Steeds* v. *Steeds* [4]; *Powell* v. *Broadhurst* [5]; *Wallace* v. *Kelsall* [6] referred to.]

Second appeal from the decree of the District Court of Madura in A. S. No. 321 of 1905, presented against the decree of the Court of the Subordinate Judge of Madura (East) in O. S. No. 25 of 1904.

T. Rangachariar and *C. S. Venkatachariar* .. for appellants.

P. R. Sundara Aiyar and *K. N. Aiya* .. for respondent.

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* S. A. No. 683 of 1907. 5th January 1910.

1. (1897) I L.R. 20 M. 461.
2. (1901) I.L.R. 25 M. 26.
3. (1903) I.L.R. 27 B. 293.
4. (1889) 22 Q.B.D. 537.
5. (1901) 2 Ch. 160.
6. (1840) 55 R.R. 707.

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The Court delivered the following

JUDGMENT:—The suit is for a declaration that the sale of a pangu of melvaram right by the second to the first defendant and the redemption of another pangu mortgaged to the predecessors in interest of the plaintiffs and defendants Nos. 2 to 7 by a payment to the 2nd defendant are not binding on the plaintiffs. The pangus in question are found by the District Judge to have been under attachment by the Head Assistant Magistrate and in the possession of a receiver appointed by him in proceedings under Chapter XII of the Code of Criminal Procedure. The suit is dismissed by the District Judge on the grounds that it was barred by limitation, having been instituted more than three years since the dates of sale and redemption, and that consequential relief in the nature of possession not having been prayed for, S. 42 of the Specific Relief Act operated as a bar. The plea of limitation is obviously untenable. And the respondent's vakil did not attempt to support it. The article applicable is 120 of Act XV of 1877 and the suit, is in time. It is also conceded that the District Judge was wrong in holding that the plaintiffs were bound to sue for possession. The defendants were not in possession at the date of suit, and it is well settled that where the defendants are not in possession the plaintiffs are not entitled to further relief in the nature of possession and are therefore not bound to ask for it against them. But Mr. Sundara Aiyar argues that on the plaintiffs' own case they were entitled only to a share in the pangus in question and that they were therefore bound to ask for a partition of their share as further relief to which they were entitled in addition to the bare declaration of title. This contention was not raised in either of the Courts below. And even if there is any force in it we are not inclined to allow the respondent to raise it for the first time in second appeal. The plaintiffs averred that they and defendants Nos. 2 to 7 were divided in interest, though originally members of an undivided family. The 8th defendant admitted this allegation in paragraph No. 8 of his written statement. The parties in occupation ot the property are the kudivaramdars. The melwaram is enjoyed in marakkal kuttu and the share of the melwaram due to the plaintiffs and defendants Nos. 2 to 7 is alleged to be enjoyed according to the partition in

accordance with the respective interests of the divided members. Division being admitted in the family we cannot accede to Mr. Sundara Aiyar's contention raised for the first time in second appeal that so far as the suit property is concerned it has been kept undivided, the presumption of law being in favour of a complete division. Holding then that the melwaram right has been divided amongst the sharers we are not prepared to allow that in every case of divided enjoyment by division of the produce there must necessarily be a further physical division of the property by metes and bounds. We, must therefore, decline to entertain Mr. Sundara Aiyar's contention that further relief was claimable in this case by the plaintiffs.

The District Judge also finds upon the 8th and 9th issues that the redemption and sale are binding upon the plaintiffs. It is not clear on what grounds he has arrived at this conclusion. The 2nd defendant according to the plaintiffs' case is only one of several tenants-in-common interested in the suit properties. The District Judge has not found to whom the two pangus belonged on the dates of sale and redemption. In one part of his judgment he speaks of the fifth plaintiff as possibly a major in June 1898. In another place he says the 2nd defendant executed the document as guardian of the 5th plaintiff. These statements are not reconcilable. The decision of the Court below on the issues Nos. 3 and 4 being clearly erroneous and there being, in our opinion, no evidence to support the findings on the 8th and 9th issues, we must reverse the decision of the Court below. But Mr. Sundara Aiyar raises another question on behalf of the respondent, that the 2nd defendant as a tenant-in-common entitled to the mortgage along with the plaintiffs was legally competent to receive payment of the mortgage money and give a valid discharge to the first defendant as regards one pangu under mortgage. Although the validity of the redemption is made the subject of the 8th issue it is perfectly plain that the contention was merely that the 5th defendant was solely interested in the mortgage and that the 2nd defendant was competent to accept payment on his behalf. This, no doubt, is entirely different from Mr. Sundara Aiyar's present contention. But being purely one of law arising out of the plaintiff's own case we have allowed it to be argued,

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The point is not one free from difficulty. It was held in *Barber Maran* v. *Ramana Goundan*,[1] by *Collins* C. J. and *Shephard* J., that where the mortgagor paid one of two co-mortgagees the whole mortgage money, the payment was a valid discharge of the mortgage and the unpaid mortgagee was not entitled to sue for his share. This decision has been recently followed in S. A. No. 419 of 1905 by *Benson* and *Sankaran Nair* JJ. In *Ahinsa Bibi* v *Abdul Kader Saheb*,[2] however, Mr Justice *Bhashyam Aiyangar* doubted the correctness of the decision in *Barber Maran* v. *Ramana Goundan*,[1] though the case before him was distinguishable from the earlier one, and he rested his decision on the ground that the payment pleaded was to one of the representatives of the mortgagee and did not come within the rule enunciated in *Barber Maran* v. *Ramana Goundan*,[1] as to the validity of payments to one of the co-mortgagees. The opinion expressed by Mr. Justice *Bhashyam Aiyangar* in this case has been followed in *Sitaram* v. *Shridhar*,[3] and apparently quoted with approval in *Jagat Tarini Dasi* v. *Naba Gopal Chaki*[4]. Mr. Justice *Shephard* who took part in the decision in *Barber Maran* v. *Ramana Goundan*,[1] has further considered the question in his Notes to S. 84 of the Transfer of Property Act: see pages 381 to 384, and re-affirmed his view with some additional arguments in its support. In the decision in *Barber Maran* v. *Ramana Goundan*,[1] he followed the decision in *Wallace* v. *Kelsall*[5], and apparently doubted the correctness of *Steeds* v. *Steeds*[6]. The latter case has been followed and explained in *Powell* v *Broadhurst*[7]. The decision in this last case has not shaken Mr. Justice *Shephard* in the conclusion arrived at by him in *Barber Maran* v. *Ramana Goundan*[5] though it has led him to consider the matter in his Commentaries on the Transfer of Property Act. It must be observed, however, that the doubts thrown on the decision in *Steeds* v. *Steeds*[6] must now be regarded as of no validity. All these English cases, moreover, have been quoted in recognized text books without a word of adverse comment and as fully authoritative: see LEAKE on

1. (1897) I. L. R. 20 M. 461.
2. (1901) I.L. R. 25 M. 26.
3. (1903) I. L. R. 27 B. 293.
4. (1907) I. L. R. 34 C. 305.
5. (1840) 55 R.R. 707.
6. (1889) 22 Q. B. D. 537.
7. (1901) 2 Ch. 160.

Contracts, pp. 298 and 626; CHITTY on *Contracts*, p. 744; COOTE on *Mortgages*, pp. 556 and 733. Mr. Justice *Shephard* himself does not appear to adhere to his doubts as to the correctness of *Steeds* v. *Steeds.*[1] But he seems to rely on *Wallace* v. *Kelsall*[2] as still good law, notwithstanding the later cases, and raises a doubt as to the applicability of the English law to this country. The principal ground of the decision in *Barber Maran* v. *Ramana Goundan*,[3] is the provision in the last clause of S. 38 of the Indian Contract Act "that an offer to one of several joint promisees has the same legal consequences as an offer to all of them." But an offer of performance is not a discharge of the obligation. The consequence of a tender is merely that the promisor is not responsible for non-performance; nor does he thereby lose his rights under the contract. Interest will cease to run on the debt from the date of tender. The offer then not amounting to a discharge, it is difficult to see why the fact of tender to one of two joint promisees being good for certain purposes such as the preventing of further interest running should override the provisions of S. 45 of the Indian Contract Act which in express terms says "that the right to claim performance rests as between the promisor and the joint promisees with them during their joint lives and after the death of any of them with the representatives of such deceased person jointly with the survivor or survivors and after the death of the last survivor with the representatives of all jointly." There is, of course, the qualification that the above rule only holds good unless a contrary intention appears from the contract.

The rule as to the effect of a tender to one of two or more joint promisees is taken from *Douglas* v. *Patrick*[4]: see HALSBURY'S *Laws of England*, Vol. VII, S. 863. But that as well as the rule in *Wallace* v. *Kelsall*[2] is merely the result of the jointness of the obligation with its incident of survivorship. As stated by *Wills* J. in *Steeds* v. *Steeds*[1] "the reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt with its inci-

1. (1889) 22 Q. B. D. at p. 541.
2. (1840) 55 R. R. 707.
3. (1897) I. L. R. 20 M. 461.
4. (1790) 3 Term Rep. p. 683 s.c. 1 R.R. 793.

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dent of survivorship and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand and he cannot afterwards by joining the other parties with him as plaintiffs recover the debt. Nor can a right of action be supposed to exist, which, if it existed, might survive to the very person who had already received full value. In Equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will *prima facie* be regarded as tenants-in-common and not as joint tenants both of the debt and of any security held for it." It is obvious from the foregoing passage that as it was a presumption in Equity that the mortgagees were tenants-in-common in the absence of a stipulation to the contrary, payment to one of two joint mortgagees was not a good discharge of the whole, *i.e.*, even of the share of the other mortgagee. This rule of Equity prevails over the rule of the Common Law after the enactment of Sub-Sec. 11 to S. 25 of the Judicature Act of 1873. Sections 60 and 61 of the Conveyancing Act of 1881 have now laid down special rules in the case of obligations for sums of money expressed to be advanced on joint account as regards the effect of payment to the survivor or the representatives of the last survivor etc.—see HOOD and CHALLIS on *Conveyancing*, pp. 156 and 157. With the exception, therefore, of the special cases provided for by that enactment, the rule in Equity of a presumption of a tenancy-in-common now prevails in England with its consequence of a payment to one of two joint creditors operating only as a discharge of the share due to him. *Wallace* v. *Kelsall*[1] is still authority only to the extent that if the right to the debt is joint so as to rebut the presumption of the equitable rule payment to one of the joint creditors is a discharge of the joint debt. To quote the words of *Farwell* J.—"There was no possible conflict of any equitable rule with this (before the Judicature Act of 1873) because no bill would lie in Chancery to recover a mere money demand." Under the law in India, however, there being no distinction between the jurisdiction at Law and in Equity, and the Courts in India being Courts administering the rules of justice, equity and good conscience, there could be no difficulty in the application of the

1. (1840) 55 R.R. 707.

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equitable rule. But the whole foundation of the rule at law being the jointness of the right and that being expressly varied by the Indian Contract Act into a tenancy-in-common, it seems to us impossible to apply the rule in *Wallace* v. *Kelsall*[1] as to the discharge of joint rights by performance to one of the joint obligees.

Our attention was drawn to the special rule contained in S. 165 of the Indian Contract Act relating to the validity of delivery by the bailee to one of several joint bailors. As regards this it is not irrelevant to point out that Dr. Whitley Stokes regards it as a departure from the Civil law, the English law and the Hindu and Mahomedan laws. The English cases have made various distinctions with regard to the nature of this contract and its consequences. See *Broadbent* v. *Ledward*[2]; *May* v. *Harvey*[3]; *Atwood* v. *Ernest*[4]; *Brandon* v. *Scott.*[5] It is unnecessary to pursue the history of the provision contained in S. 165. Any special rule thereby enacted has not the force of a general principle of the law of contracts. No similar rule is laid down in the Transfer of Property Act.

It remains to notice one further remark in Shephard's Commentaries to S. 84 of the Transfer of Property Act, that the adducing of evidence at variance with a joint right under the contract, to show that the interest was several, would violate the provisions of the Indian Evidence Act. It is not easy to appreciate this criticism, for it is not by oral evidence that joint obligees under a contract are shown to be entitled to their respective interests but by the force of S. 45 of the Indian Contract Act. The recital of the advance being joint is not part of the contract to pay the joint obligees and may therefore be varied by evidence of several interests in the amount advanced. We are therefore constrained to express our dissent from the decision in *Barber Maran* v. *Ramana Goundan.*[6] We should have felt bound to refer this case to the Full Bench but for the circumstance that on the facts it is more akin to the case in *Ahinsa Bibi* v. *Abdul Kader Saheb,*[7] than to the case in *Barber Maran* v. *Ramana Goundan.*[6] The promisee

1. (1840) 55 R.R. 707.
2. (1839) 11 A and E. 209.
3. (1811) 13 East 197 s.c. 12 R.R. 322.
4. (1853) 22 L. J. C. P. 225.
5. (1857) 26 L. J. Q. B. 163.
6. (1897) I. L. R. 20 M. 461.
7. (1901) I. L. R. 25 M. 26.

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was only one person. He took the mortgage on behalf of an undivided Hindu family. That family has become divided. The promisee himself is dead and the payment is said to have been made to one of the divided members of the family of the promisee. Such a payment, it appears to us, cannot discharge the entire mortgage in which other members of the family have their several interests. We must, therfore, overrule Mr. Sundara Aiyar's contention that the redemption of the mortgage can bind the plaintiffs if they had a several interest in the mortgage at the date of the redemption. The decree of the Court below is reversed and the case remanded for disposal according to law. Costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Saminada Sastrigal	Appellant *
v.	(*Defendant*)
Pathma Bibi Ammal	Respondent
	(*Plaintiff*).

Saminadha Sastrigal v. Pathma Bibi.

Vendor and Purchaser—Sale of one of two houses belonging to the same person—Projection in a house—Right of the purchaser of the house to the space above and below.

Where two houses belonged to one owner and a part of one projected over the other and the two houses were sold to different vendees : *Held* that the projection belonged to the purchaser of the house of which it formed part, but that the purchaser was not entitled to the space above and below the projection [*Corbet* v. *Hill* 1 followed] and that the owner of the other house was not entitled to raise a construction resting on the projection, such a construction being a trespass.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 77 of 1908 presented against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 423 of 1906.

R. Kuppuswami Aiyar for appellant.

V. C. Seshachariar for respondent.

The Court made the following

ORDER:—There were three matters involved in the suit. The first of them relates to the construction resting on the

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* S. A. No. 1920 of 1908. 21st February 1910.

1. (1870) L. R. 9 Eq. 671.

Saminadha Sastrigal v. Pathma Bibi.

plaintiff's kosali.* The kosali is part of the plaintiff's house. The plaintiff's and the defendant's houses belonged originally to one owner. He conveyed the houses and the grounds attached to them to different vendees. We must hold that the kosali attached to the eastern house passed to the plaintiff, the purchaser. The decision in *Laybourn* v. *Gridley*[1] proceeded upon the special facts of that case. It is no authority for the position that the kosali of the adjoining house which overhangs the ground of the house first sold passes to the purchaser of that house. The kosali then being the plaintiff's, is she entitled to the space above and beneath it? We think not. See *Corbett* v. *Hill*.[2] Can the defendant, however, raise a construction resting on the plaintiff's kosali? No authority has been cited to us to show that this is not a trespass.

The next point raised in appeal, which is also made the subject of a ground in the memorandum of objections, is the Judge's direction that in execution the defendant's privy is to be removed if it is adjacent to the plaintiff's wall. This is wrong. We must ask the District Judge to return a finding on the evidence on record on issue No. 3. The last six words of it are not quite intelligible. The Judge will re-frame the issue in accordance with the contentions of the parties.

The memorandum of objections raises a question as to the plaintiff's right to go into the defendant's house for repairing her wall. There is no force in this contention.

The finding must be submitted within six weeks, and seven days will be allowed for filing objections.

In compliance with the above order, the District Judge of Trichinopoly submitted a finding that the defendant put up his privy pial adjacent to the plaintiff's wall; that the defendant caused damage to the plaintiff's wall thereby; but that the special damage alleged by the obstruction to the flow of water in the drain by the side of the plaintiff's wall was not made out.

This second appeal and the respondent's memorandum of objections coming on for final hearing after the return of the finding of the lower appellate Court, the Court delivered the following

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* *Kosali* means eaves or projection from the top of a wall.

1. (1892) 2 Ch. 53. 2. (1870) L. R. 9 Eq. 671.

Saminadha Sastrigal v. Pathma Bibi.

JUDGMENT:—We accept the findings of the District Judge. We must, in accordance with our previous judgment and the findings now returned, modify the decree of the lower appellate Court as follows:—

The following words in the decree namely "from raising constructions in contact with the wall A B....be refused" will be omitted and, in their place, the following inserted, namely, "from raising constructions on the portion marked yellow in the plaintiff's plan and which we have called XY, so as to prevent the fall of the eavesdroppings from the plaintiff's roof."

We must also omit the portion of the lower Court's decree from "that if it is found" etc., to "contact with the wall", and insert the following in its place:—

"That the defendant be directed to remove the pials in his privy so as not to allow of the excreta coming in contact with the plaintiff's wall."

We must order the appellant to pay the costs of the respondent.

The memorandum of objections is dismissed but without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Miller and Mr. Justice Abdur Rahim.

Kollipara Seetapaty .. .. Appellant*
(*Petitioner in C. R.P. No.* 444 *of* 1907)

v.

Kantipati Subbayya .. .. Respondent
(*Respondent in Do.*)

Provincial Small Cause Courts Act (IX of 1887), S. 16—Small Cause suit tried as original suit wrongly—Appeal to Sub-Court—Revision by High Court—Practice—Procedure.

Where a Small Cause suit is tried by the Munsif on the Original Side and his decision is reversed on appeal, by the Subordinate Court the High Court is bound to set aside the decree of the lower appellate Court, as one passed without jurisdiction.

[*Parameshwaran Nambudiri* v. *Vishnu Embrandari*[1] overruled; *Ramasami Chettiar* v. *R. G. Orr*[2] and *Sonkarbhai* v. *Sonabhai*[3] approved.]

* L. P. A. No. 6 of 1908. 5th March 1909.

1. (1904) I. L. R. 27 M. 478. 2. (1902) I. L. R. 26 M. 176.
3. (1900) I. L. R. 25 B. 417.

Kollipara Seetapaty v. Kantipati Subbayya

Appeal under S. 15 of the Letters Patent from the judgment of Mr. Justice *Wallis* in C. R. P. No. 444 of 1907.

This appeal coming on for hearing in the first instance on the 1st September 1908 before Mr. Justice *Sankaran Nair* and Mr. Justice *Abdur Rahim*, their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH.—*Sankaran Nair* J.:—The plaintiff in O.S. No. 385 of 1904 on the file of the Court of the District Munsif of Ellore sued to recover Rs. 45 under an award made by an arbitrator under a muchilika executed by the parties. The defendant denied the reference and raised various other objections which were overruled by the District Munsif who passed a decree in favour of the plaintiff. This decree was reversed on appeal by the Subordinate Judge of Ellore who held that the reference was vague and the arbitrator, therefore, might have decided questions not referred to him for arbitration. The plaintiff applied to this Court under S. 622, Civil Procedure Code, to set aside the decree of the Subordinate Judge on the ground that, as the suit was one cognizable by a Small Cause Court, no appeal lay to the Subordinate Judge and his decision was passed without any jurisdiction.

The learned Judge who heard the Revision Petition, following the case in *Parameshwaran Nambudiri* v. *Vishnu Embrandari*, [1] declined to interfere for the reason that the plaintiff himself instituted the suit on the original side and could not, therefore, be heard to complain that the defendant filed an appeal aganist the decree in the original suit.

This is an appeal against his order. It is conceded on both sides that the suit ought to have been tried as a Small Cause suit. Section 16 of the Provincial Small Cause Courts Act is in these terms: "Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable." This section apparently only regulates the procedure and does not deprive the District Munsif of the jurisdiction vested in him by the

1. (1904) I. L. R. 27 M. 478.

Kollipara Seetapaty v. Kantipati Subbayya.

Madras Civil Courts Act. However that may be, this has to be read with S. 646 (*b*) [C. P. C.—ED.] which gives power to the District Court to submit to the High Court for revision, the records in a suit erroneously decided by a subordinate Court under a mistake as to its jurisdiction. I agree with the decision of the Allahabad High Court in *Ram Lal* v. *Kabul Singh*[1], that the words, "by reason of erroneously holding" in that section imply that it is only when the question of jurisdiction is raised before the first Court that the parties are entitled under that section to request the District Judge to make a reference to the High Court. Before judgment, the Court may make the reference under S. 646 (*a*) [C. P. C.—ED.] if it entertains any doubt as to the jurisdiction: after judgment the District Judge may refer, if he considers the decision of the first Court on the point of jurisdiction erroneous, and on reference by the District Judge, the High Court "may pass such order as it thinks fit." It is clear, therefore, that the decision of the Court of first instance is not to be set aside on the sole question of jurisdiction.

I agree, therefore, with the learned Judges in *Parameshwaran Nambudri* v. *Vishnu Embrandiri*[2], that the principle of the express provision in S. 646 (*b*) should be followed in the exercise of the discretion allowed by S. 622 [C.P.C.—ED.] and that we should not interfere solely on this ground with the decision of a Court of first instance even when the question was raised and *a fortiori* when the question was not raised.

Does the same principle apply in favour of the decision of an appellate Court? In the case in *Parameshwaran Nambudiri* v. *Vishnu Embrandiri*,[2] it was perhaps unnecessary to decide the point as the decision of the appellate Court confirmed the decree of the first Court and, unless that decree was set aside, the petitioner before the High Court could not derive any benefit.

In the case of *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*[3] the Calcutta High Court have decided that we are to apply the same principle to the appellate Courts. The learned Judges say: "If no objection to jurisdiction is raised, the District Court is left to act in exercise of its own discretion either to decide the appeal or to submit the case to the High Court." They further add that, if the parties require it, the District Judge is bound

1. (1902) I. L. R. 25 A. 135. 2. (1904) I. L. R. 27 M. 479.
3. (1893) I. L. R. 21 C. 249.

Kollipara Seetapaty v. Kantipati Subbayya.

to submit the case for the orders of the High Court. In the case before us the appeal was heard by the Subordinate Judge who has apparently no power to act under S. 646 (*b*). The learned Judges, it appears to me, have ignored the fact that the District Court under S. 646 (*b*) does not act as a Court of appeal; that even in cases where no appeal lay or where no appeal is filed, the Court may or shall act under that section, and that S. 646 (*b*) does not enable the High Court to deal with the decision of the appellate Judge on the merits of the case. For these reasons I am of opinion that, in considering whether we ought to interfere with the decree of an appellate Court, no inference is to be drawn from S. 646 (*b*). It stands to reason that a suit tried by the Munsif on the original side should not be sent to the same Munsif to be tried as a small cause suit. But the same reasons do not obviously apply to a decision in appeal.

Disregarding S. 646 (*b*) in this respect, I am of opinion that the decisions in *Shankarbhai* v. *Sonabhai*[1] and *Ramasami Chettiar* v. *R. G. Orr*[2], so far as the appellate decision is concerned, should be followed and that the decree of the lower appellate Court should be set aside and that of the Munsiff be restored with costs throughout. I need hardly add that consent cannot give jurisdiction to the District Court—*Ledgard* v. *Bull*[3]; *Minakshi* v. *Subramanya*[4].

But as the case *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*[5] has received the approval of this Court in *Parameshwaran Nambudiri* v. *Vishnu Embrandiri*[6], I would refer to the Full Bench the following question :—

"Where a small cause suit is tried by the Munsif on the original side and his decision in appeal is reversed by the subordinate Court, is the High Court bound to set aside the decree in appeal as having been passed without jurisdiction?"

Abdur Rahim J.:—I agree.

P. Nagabhusanam for appellant.

P. Narayana Murti for respondent.

1. (1900) I. L. R. 25 B 417.
2. (1902) I. L. R. 26 M. 176.
3. (1886) I. L. R. 9 A. 191 (P.C.)
4. (1887) I. L. R. 11 M. 26 (P. C.)
5. (1893) I. L. R 21 C 249.
6. (1904) I. L. R. 27 M. 479.

Kollipara Seetapaty v. Kantipati Subbayya.

This appeal coming on for hearing before the Full Bench, upon perusing the order of reference to the Full Bench, the Court expressed the following

OPINION:—We are unable to agree with the view taken by the learned Judges in *Parameshwaran Nambudri* v. *Vishnu Embrandari*[1] as regards the appellate decision in that case. As the decision of the appellate Court in the case before us was made without jurisdiction we think this Court is bound to set it aside. As regards the decision of the appellate Court we think the cases *Ramasami Chettiar* v. *R. G. Orr*[2] and *Shankarbhai* v. *Sonabhai*[3] were rightly decided.

We would answer the question which has been referred to us in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr Justice Benson and Mr. Justice Miller.

Robert Fisher .. Appellant*

v.

S. Kanakasabapathy Mudaliar ..Respondent.

Fisher v. Kanakasabapathy.

Provincial Small Cause Court Act (Act IX of 1887), *S.* 25—*Application not necessary for revision—Second appeal converted into revision petition—Contract Act, S.* 70—"*Lawfully does anything for another*"—*Repair of natural stream—No contribution between riparian owners.*

S. 25 of the Provincial Small Cause Courts Act does not require an application before action is taken ; and the High Court can interfere in revision with the order of a Munsif in a Small Cause suit without an application therefor.

Where a second appeal preferred from an appellate judgment in the small cause suit became incompetent by reason of the judgment of the lower appellate Court having become a nullity for want of jurisdiction ; *held* there was nothing to prevent the High Court from interfering in revision with the first Court's judgment if the same be found erroneous.

S. 70 of the Contract Act is not to be read so as to justify the officious interference of one man with the affairs or property of another or to impose liability in respect of services which the person charged did not wish to have rendered. A natural stream is in no sense the joint property of the various riparian owners and if one repairs it of his own accord he is not entitled to any contribution from other riparian owners.

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* S. A. No. 433 of 1906. 23d August 1909.

1. (1904) I. L. R. 27 M. 479. 2. (1903) I. L. R. 26 M. 176.

3. (1900) I. L. R. 25 B 317.

Second appeal from the decree of the District Court of Salem in A. S. No. 114 of 1904, presented against the decree of the District Munsif of Salem in O. S. No. 59 of 1903. Fisher v. Kanakasabapathy.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Salem in A. S. No. 114 of 1904 presented against the decree of the Court of the District Munsif of Salem in O. S. No. 49 of 1903.

This was an action for contribution, and plaintiff claimed Rs. 91-0-10 being the amount due to him from defendant for executing repairs to a channel irrigating the nanja lands of both parties. The plaintiff wishing to repair communicated his intention to the defendant with a view to make the defendant partly pay for the repair. The defendant refusing his sanction, the plaintiff repaired it himself, and having thereby benefited the defendant by making the water flow to his lands also, sued for contribution.

Defendant denying that he was liable for contribution contended that the plaintiff executed the repairs voluntarily and for his own benefit, and that the suit was bad for want of proper parties. He also ignored acknowledgment of the amount expended by the plaintiff in executing repairs.

The following issues were framed:—

(1) Has the plaintiff repaired the channel in the plaint, and if so, at what cost?

(2) Is defendant bound to contribute a proportionate amount, and if so, what is the correct proportion?

(3) Is the repair made by the plaintiff a voluntary act or one made out of necessity, in the interests of the defendant also? If the latter, is not the defendant bound to contribute if the repair had been executed without his consent and against his wishes?

(4) Is the suit bad for non-joinder of proper parties?

The District Munsif found issues 1 to 3 in favour of the plaintiff and issue No. 4 in the negative, and decreed that defendant should pay Rs. 86-8-0 to the plaintiff, which decree was reversed by the District Judge. Hence this appeal. A revision petition was also filed lest a second appeal may not lie. The respondent in the Civil Revision Petition died and his legal representative was not brought on record within six months.

Fisher v. Kanakasabapathy.

T. Rangachariar for appellant.

T. M. Krishnaswami Aiyar for *T. Subramania Aiyar* for respondent.

T. Rangachariar:—Neither Art. 176 nor Art. 177 of the Limitation Act applies to civil revision petitions. Moreover here the right accrued before the new Act came into force. [*T. M. K. Aiyar*—They apply even to miscellaneous proceedings]. It is true that the Act benefits the plaintiff also. The channel absolutely required repairs; the repairs *saved* the common property. A joint owner saving a common property cannot be intended to do so gratuitously. If the suit is one of a small cause nature a revision would lie against the judgment of the District Judge who had no jurisdiction to interfere with the judgment of the Munsif—*Jagadish* v. *Kripanath Saha*[1]; *Narayan* v. *Gangâram*[2]; *Shakkarbhai* v. *Sonahbai*[3]; *Ramasami Chettiar* v. *R.G., Orr.*[4]; *Pitambar* v. *Dhonder*[5].

T. M. Krishnasawmi Aiyar:—The right of appeal depends upon the nature of the tribunal and not upon the nature of the cause—*Perumal* v. *Venkatasubba*[6]. There is in no section in the chapter relating to appeals any provision corresponding to S. 586, C.P.C., or S. 96 of the New Code. S. 16 of the Small Cause Court Act does not prohibit the trial of a case on the regular side by the same Judge who would try it in the small cause side—*Parameswaram* v. *Vishnu*[7]. If there be only a revision, I can come under S. 25 of the Small Cause Courts Act and, if any delay, may be excused as I was misled to file an appeal by the practice prevailing and I submit that the Munsif was wrong in law and that the Judge was right. No written application is necessary under S. 25. There is no duty to repair a natural stream—COULSON on *Waters*, p. 136. I refused to be liable for the expenses of the repair. This is an officious interference on the part of the plaintiff. S. 70 of the Contract Act does not apply. This distinguishes *Damodara* v. *Secretary of State for India*[8].

T. Rangachariar replied. [*Miller* J.—You come under S. 622. The Court has got a discretion then.] Where it is a question of jurisdiction there is no discretion vested—*Ramasami Chettiar* v. *R. G. Orr*[4] and *Jagadish* v. *Kripanath*[1]. The law in

1. (1909) I.L.R. 36 C. 130.
2. (1909) 11 B.L.R. 817.
3. (1900) I.L.R. 25 B. 417.
4. (1903) I.L R. 26 M. 176.
5. (1887) I.L.R. 12 B. 486.
6. (1887) I.L.R. 11 M. 301 321.
7. (1904) I.L.R. 27 M. 479.
8. (1894) I.L.R. 18 M. 88.

India as regards S. 70 is much wider than in England. Great delay that has elapsed prevents this Court from entertaining a revision now. Fisher v. Kanakasabapathy

The Court delivered the following

JUDGMENT :—We are bound by the as yet unreported opinion of the Full Bench in the L. P. Appeal No. 6 of 1908 to set aside the decree of the District judge as having been made without jurisdiction. We then have the decree of the District Munsif before us, and the respondent asks us, in the circumstances of the case, to satisfy ourselves whether it is right in law, and if not, to make an order under S. 25 of the Provincial Small Cause Courts Act IX of 1887. It is not denied that we have jurisdiction to take this course, but it is contended that we ought not to do so without an application. Section 25, Act IX of 1887, however, does not require an application before action is taken. We think we may, therefore, take the decree of the District Munsif into consideration and we are clearly of opinion that it was wrong and ought to be set aside. The case of *Damothara Mudaliar* v. *Secretary of State for India*[2] differs materially from the present case; that was a case of an artificial tank; this is a case of natural stream which is in no sense the joint property of the various riparian owners. In that case the zemindar did not decline to accept the work as done for his benefit; in this the defendant did do so. The case points out that S. 70 of the Indian Contract Act (Act IX of 1872) is not to be read so as to justify the officious interference of one man with the affairs or property of another or to impose subjection in respect of services which the person charged did not wish to have rendered and the learned Judges were able to apply that section only because the absence of disapproval by the zemindar made it lawful for the Government to do the act for him within the meaning of that section.

Here there is no such case : the defendant did not want any work to be done for him and said so ; the work was not done on his property or to save his property from inevitable destruction, and he did not want it. Moreover, the plaintiff having notice that the defendant did not want the work and would not pay for it was not justified in doing it for him unless he intended to do it

1. Reported in (1908) 20 M.L.J. p. 718. 2. (1894) I.L.R. 18 M. 88.

gratuitously. We set aside the decree of the District Judge. The decree of the District Munsif is reversed and the suit dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Sir. T. Muthusawmi Aiyar, *K. C. I. E.*, Justice, and Mr. Justice Handley.

Raghava Chariar .. Appellant*
v. (*Defendant*)

Raghava Chariar, Executor to the Estate of the Minor Vedantha Chariar .. Respondent (*Plaintiff*).

Suits Valuation Act, S. 11—"*Prejudicially affected the disposal of the suit on the merits*"—*C.P.C.*(*XIV of* 1882), *S.* 578—*Jurisdiction of Civil Court—Suit for removal of trustee for breach of trust—Forum.*

In a suit for removal of a trustee for breach of trust, the value of the trust property is the guide for the determination of the forum.

The effect of S. 11 of the Suits Valuation Act is simply to place over-valuation or under-valuation of suits on the same footing with other irregularities contemplated by S. 578, C. P. C. (XIV of 1882), except that the objection must be taken either in the Court of First Instance or in the lower appellate Court; and the mere change in forum consequent on an under-valuation cannot of itself be treated as prejudicially affecting the disposal of the suit on the merits within the meaning of S. 11 of the Suits Valuation Act.

Raghava Chariar v. Raghava Chariar.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 572 of 1891, presented against the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 109 of 1890.

This was suit to remove the defendant from the office of a co-trustee and to restrain him by an injunction from interfering in the acts done by plaintiff as a co-trustee of the plaint mentioned minor's property.

The plaintiff and the defendant were co-executors of the will of one Krishnaswami Aiyangar. Under the same will they were appointed co-trustees for the two widows and the minor adopted son of the deceased and also for carrying on a charity. The plaintiff sued to remove the defendant from the co-executor-

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* A. 848 of 1892. 3rd February 1893.

Raghava Chariar v. Raghava Chariar.

ship and co-trusteeship on the ground of his misappropriation of the trust funds and his failure to co-operate in the execution of the will and the trust.

The defendant objected to the suit being within the Court's jurisdiction, both under the Trust Act of 1882 and on account of the whole of the Trust property being of more than the Court's pecuniary limits. The plaint was returned to the proper Court which had jurisdiction, but the District Court had reversed the order of return and directed the Court of First Instance to receive the plaint and dispose of it on the merits. The Court of First Instance has found most of the charges against the defendant to be unsubstantiated but having found that the defendant had failed to account satisfactorily for two sums of Rupees 1,306 and Rupees 115,(amounting to Rupees 1,421 in all), a conditional decree was passed that if the defendant do not pay the amount within three months he would be removed from office but otherwise the suit would be dismissed.

The plaintiff valued the plaint for the purposes of jurisdiction at Rs. 2,400.

C. Ramachendra Row Sahib and *T. Rungaramanujachariar* for appellant.

V. Bhashyam Aiyangar and *C. R. Tiruvengadachariar* for respondent.

The Court delivered the following

JUDGMENT :—The concurrent finding of both Courts that appellant has misappropriated Rs. 1,421 of the trust property is sufficient to support the decree for his removal from the office of co-trustee with plaintiff. There is evidence to support this finding and we cannot, therefore, interfere with the decision in second appeal.

It is objected on behalf of appellant that the property—the subject of trust—being admittedly over Rs. 20,000 in value, the District Munsif had no jurisdiction to try the suit. The lower appellate Court has treated the case as coming within the class of suits which are incapable of valuation and therefore accepted the value put upon the suit by plaintiff with reference to the amount alleged to have been misappropriated by appellant. We are of opinion that the value of the trust property ought to have been taken as a guide to the determination of the question

Raghava Chariar v. Raghava Chariar.

of jurisdiction. The objection was taken both in the Court of first instance and in the lower appellate Court. But under S. 11 of the Suits Valuation Act (Act VII of 1887) we are precluded from entertaining the objection unless we are satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. The mere change of forum consequent on the under-valuation cannot of itself be treated as prejudicially affecting the disposal of the suit on the merits within the meaning of the section, for that is the very case premised and provided for by the section. Reading the section together with S. 578 of the Code of Civil Procedure, we consider that the words "prejudicially affected the disposal of the suit on the merits" must be construed in the same way as they would be construed with reference to any error, defect or irregularity contemplated by that section. The effect of S. 11 of the Suits Valuation Act is simply to place over-valuation or under-valuation of suits on the same footing with other irregularities contemplated by S. 578, except that the objection must be taken either in the Court of first instance or in the lower appellate Court. In the present case we do not consider that the under-valuation has prejudicially affected the disposal of the suit on the merits. We, therefore, refuse to entertain the objection to the jurisdiction.

The appeal fails and is dismised with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Sree Rajah Venkatarangayya Appa Row Bahadur Zamindar .. Appellant.* (*Plaintiff*)

v.

Poranki Appalarazu and others .. Respondents.

Madras Reg. XXV of 1802, *S.* 4—*Presumption—Lands held on service tenure before Permanent Settlement—Lakhiraj.*

There is no presumption that land held free of rent to the Zemindar for rendering service to the Zemindar before the Permanent Settlement was Lakhiraj land at the date of the Permanent Settlement, so as to enable the Government to impose full assessment thereon.

Second appeal from the decree of the District Court of Kristna in A. S No. 103 of 1906 presented against the decree of the Court of the District Munsif of Gudivada in O. S. No. 177 of 1904.

* S. A. 73 of 1908. 1st March and 22nd April 1910.

The land in question formed a portion of certain lands which were given by the Zemindar to certain people for Batraju or minstrel service in A.D. 1718. In 1862 the Inam Commissioner made an enquiry as to the conditions on which the land was held but though an Inam Register was prepared no Inam title deed was issued. In 1869 one of the Batraju service holders died issueless and the Zemindar resumed his lands which are the suit lands and granted them to a tenant, the tenant stipulating in his *kadapas* every year that he would surrender them at the end of each year and obtain fresh pattas. In 1900 the Government imposed assessment, alleging that they were lakhiraj lands in 1802, *i. e.* at the time the permanent *Sanad* was issued to the Zemindar, and that therefore he had no title thereto. This suit was filed by the Zemindar for the recovery of lands from the tenant. On the tenant's written statement the Government also was made a defendant. The real question in the case is whether the Zemindar or the Government is to be the landlord of the tenant. The lower Courts held that since the service tenure was created prior to the Permanent Settlement the Zemindar had no right now to recover the lands.

V. Ramesam for appellant.

The Government Pleader (*C. F. Napier*), *J. Satya Nadar* and *Devadoss* for *T. Prakasam* for respondents.

V. Ramesam:—The land is within the Zemindari. The onus is upon the Government to show that this land was not taken into account at the time the Government calculated the permanent assessment. There is no presumption that service tenures created prior to permanent settlement are not resumable. There is nothing to show that this land was lakhiraj, *i. e.*, not paying assessment at the time of the permanent settlement. At any rate service is equivalent to money. The Inam Commissioner has not issued any title deed. He simply enquired and stopped without issuing title.

The Government Pleader.—This is lakhiraj property and the Government can resume. Unless these were Inams already, the Inam Commissioner had no jurisdiction to take them into his consideration at the time of the Inam Commission. The Inams are within the Zemindari. As regards the resumption of service

Rajah Venkatarangayya v. Appalarazu.

tenures, see *Forbes* v. *Meer Mahomed Tuquee*[1] for legal presumption in such cases. See also Ss. 4 and 12 of Act XXV of 1802. The Government has the right to resume.

Devadoss :—Even if the Government has not the right to resume, the lands cannot be resumed by whomsoever they were granted. This is land given for service. The plaintiff must show the conditions on which the land was granted. See *Bommadevara Venkatanarasimha* v. *Govindarajulu Venkatasubbarayadu*[2] for the position that lakhiraj lands are not the Zemindar's property. As to when service lands can be resumed and as to onus being on plaintiff see *Forbes* v. *Meer Mohamed Tuquee*[1]; *Lakhamganda* v. *Keshav Annaji*[3]. It won't do for the Zemindar to say that he no longer wants the service and thereby try to resume the land—*Baboo Koolodeep* v. *Mahadev Sing*[4].

V. Ramesam in reply :—*Kadapas* have been exchanged by the tenants for the last 30 years in respect of some lands ; each *kadapa* which was for one year stipulating that the tenant at the end of each year will surrender the land in his possession. The question in the second issue is whether I am entitled to eject the tenants or whether I should retain them being entitled only to rent. There is no question of resumption in the case. Lakhiraj lands are lands which the Zemindar once alienated without any right to rent. Service is equivalent to rent; so this is not lakhiraj—*Raja Lelanand Singh Bahadoor* v. *The Bengal Government*[5]; *Raja Nilmoni Singh* v. *Bakranath Singh*[6]. If it is not part of the Zemindari how could there have been any private service under the Zemindar ? The fact that the Inam Commissioner allowed it to continue on the old tenure, knowing that they were held on service tenure, shows that he treated the lands as the Zemindar's.

The Court delivered the following

JUDGMENT.—It is contended by the Government Pleader that on the finding that the inams were granted before the settlement, and at the time of the settlement were exempt from the payment of any rent to the Zemindar and held on condition of doing service for him, a presumption arises that the land is

1. (1870) 13 M. I. A. at 457, 465, 466.
2. (1908) 5 M. L. T. 225.
3. (1901) I. L. R. 28 B. 305, 309.
4. (1866) 6 B. L. R. 199.
5. (1855) 6. M. I. A. 101, 114.
6. (1882) I. L. R. 9 C. 187 (P.C.).

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lakhiraj within the meaning of S. 4 of Regulation XXV of 1802. This contention is based on *Forbes* v. *Meer Mahomed Tuquee*[1]. There it was held, at page 457, that the land there in question being held rent free at the date of the settlement could presumably be treated as lakhiraj. But the lands in that case were held under Sanads granted by the Government, and not as here by the Zemindar. In the case before us the findings are that the inams were granted by the Zamindar Narasimha Apparow before the Permanent Settlement as reward or emoluments for private services rendered to him on condition that they should be held so long as the services continued to be rendered. We are unable to see how from these facts any presumption can arise that the land was at the Permanent Settlement exempt from the payment of public revenue. It was pointed out by the *Chief Justice* in *Raja Nilmoney Sing* v. *The Government*[2] that "the Government would not have allowed any portion of their revenue in consideration of private services to be rendered to the Zemindar." The decision in that case was affirmed by the Privy Council, and the remark I have quoted is quoted also without disapproval in the judgment of that tribunal in another case—*Raja Nilmoni Singh* v. *Bakranath Singh*[3]—and these *dicta* rather than the observations in *Forbes* v. *Meer Mahomed Tuquee*[1] would seem to be applicable to the present case. The Courts below have, it seems to me, made a mistake by confounding the public revenue and the Zemindar's income. The District Munsif deals with the question in paragraph 9 of his judgment. The Zemindar at the time of the grant was not proprietor: therefore he could not exempt the land from payment of revenue without the concurrence of the Government. The Government can therefore reimpose full assessment, when it pleases, on land exempted by the Zemindar from payment of public revenue. The fallacy lies in the assumption that because the Zemindar allowed his peons to occupy the land free of money rent in lieu of wages, the land becomes exempt from the payment of public revenue to the Government of the day. There is no evidence that the land in question was not after its grant an inam held as security for the payment of the Government

1. (1870) 13 M.I.A. 438. 2. (1866) W.R. 121.
3. (1882) 9 I.A. 104 at p. 121.

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revenue by Narasimha Apparow, and there can, we think, be no presumption that the Government gave up its right merely because Narasimha Apparow wanted to provide a supply of hereditary peons for his own benefit. The District Judge holds that the lands were evidently excluded from the assets because they were held free of money rent to the Zemindar before the Permanent Settlement. He seems to have fallen into the same error, taking "free of money rent to the Zemindar" and "exempt from the payment of the public revenue" to be synonymous terms. The lands were a source of profit to the Zemindar; he used them to pay his servants, and it seems to me the burden is on the Government to show that they were *lakhiraj* at the Permanent Settlement.

The question is one of fact with which we cannot deal in second appeal and we must call for fresh findings in the light of these observations and on the evidence on record on the questions: (1) whether the land was lakhiraj land at the date of the Permanent Settlement; (2) if not whether the plaintiff is entitled to eject the 1st and 2nd defendants-respondents. The findings should be submitted within one month after the reopening of the District Court. Seven days will be allowed for filing objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Peram Narasigadu	..	Appellant* (*Plaintiff*)
v.		
Machiredi Butchireddi & others	..	Respondents (*Defendants*).

Peram Narasigadu v. Machireddi Buchireddi.

Landlord and Tenant—Sale of holding without notice to assignee from puttadar invalid.

The landlord is bound to find out who holds the tenant's interest and proceed against him for the rent in arrear, and in the absence of any notice of the arrear or of the attachment, to the assignee from the holder of the pattah, the assignee's interest will not pass by a sale thereon.

Second appeal from the decree of the District Court of Nellore in A. S. No. 80 of 1907 presented against the decree of the District Munsif of Nellore in O. S. No. 167 of 1906.

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*S. A. 735 of 1908. 25th February 1910.

Peram Nasigadu v. Machired Butchired

V. Ramesam for appellant.

S. Subrahmanya Aiyar for respondent.

V. Ramesam—submitted that patta tendered to a person who is not a tenant cannot be binding as against the real tenant. It is the landlord's duty to find out who the tenant is and tender patta to him. S. A. 1213/1906.

S. Subrahmanya Aiyar cited *Orr* v. *Rakkumarathi*[1] and *Vadlammat Venktramiah* v. *Rajah Rungiah Appa Rao.*[2]

The Court delivered the following

JUDGMENT:—The plaintiff purchased a portion of the 2nd defendant's pattah land, and has been holding the same ever since with the exception of a part which he transferred to his wife. The 1st defendant, the Zemindar, has recognised the plaintiff as tenant and accepted rent from him for several years though the puttah continued to stand in the name of the 2nd defendant for the whole land. For the arrears of Fasli 1313 he took proceedings under the Rent Recovery Act against the 2nd defendant and brought to sale the plaintiff's portion which the 3rd defendant purchased. The plaintiff seeks to set aside the sale as invalid. We agree with his contention. No notice was given to the plaintiff of the arrear or of the attachment. The proceedings therefore, are void as gainst the plaintiff. Mr. Subrahmania Aiyar relies on *Orr* v. *Rakkumarathi*[1] for the view that the landlord is under no obligation to proceed against the real tenant but is at liberty to proceed against the person to whom he chooses to give puttah. We think the landlord is bound to find out who holds the tenant's interest and proceed against him for the rent in arrear. The case referred to is no authority for the position contended for. The tenancy there was admitted by the landlord. But he still wanted to make in the puttah an entry that the land in question had been sold away. This he was not permitted to do. We must, therefore, hold that the plaintiff's interest has not been legally sold to the 3rd defendant. See S. A. No. 1213 of 1906.

It is argued for the 3rd defendant that he was a *bona fide* purchaser. No question was raised before the Munsif as to the 2nd defendant having been the ostensible owner. We refuse to entertain the 3rd defendant's present contention. We must reverse the decree of the District Judge and restore that of the Munsif.

1. (1905) I. L. R. 29 M. 83. 2. (1907) I. L. R. 31 M. 6.

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Defendants Nos. 1 and 3 will pay the plaintiff's costs throughout.

The memorandum of objections put in by the 1st respondent is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Miss Irene Fanny Colquhoun .. Appellant*
v. (*Plaintiff*)
Mrs. Fanny Smithers .. Respondents.
(*Defendant*)

Miss Colquhoun v. Mrs. Smithers.

Torts—Breach of Promise—Action for procuring breach—Justification—plea of—Malice, proof of—Parent and child.

In an action for procuring a breach of promise of marriage against the mother of the promisor, malice is not the gist of the action, but proof of malice will be a sufficient answer to a plea of justification. A parent or guardian may well advise his son or daughter to break off an improvident engagement to an unworthy suitor, but if he does so maliciously and by misrepresentations, he makes himself liable in damages.

Appeal from the judgment of Mr. Justice *Wallis* in the exercise of the Ordinary Original Civil Jurisdiction of this Court in O. S. No. 369 of 1908.

The suit was against defendant for procuring the breach of a promise by her son to marry the plaintiff. Plaintiff charged the defendant with having made several false and malicious statements to the son against her and thereby procured the breach. Mr. Justice *Wallis* before whom the case came in the first instance held in effect that the rule of law laid down in *Quinn* v. *Leathem*[1] applied to marriage contracts but that having regard to history of marriage law both in India and elsewhere and the necessity for parents' consent till the children attained a certain age, the mother was absolutely justified in advising her son to break off an intended match and no Court of Law ought to ask her to disclose her reasons, and dismissed the plaintiff's suit without going into the allegations of fact made in the plaint. Hence the appeal.

V. Viswanatha Sastri for appellant.

Osborne for respondent.

V. Viswanatha Sastri.—It is actionable to induce breach of marriage without any justification on the part of the inducer

* O. S. 6 of 1909. 30th December 1909.

1. (1901) A. C. 495.

Though such actions are rare, there is no reason why such actions should not be maintainable. The doubt thrown out by *Joyce* J. in *National Phonograph Co, Ld* v. *Edison Bell Consolidated Phonograph, Company, Ld.*[1] has not been supported in the Court of Appeal. Advice is to be distinguished from inducement. Advice may not be actionable, at least if honest—SALMOND on *Torts*, p. 470; BIGELOW on *Torts*, p 264, POLLOCK on *Torts*, p. 322 (7th Edn.); *Law Quarterly Review*, Vol. XIX, p. 116. Even to an action for inducement, there might be a justification as is pointed out in *South Wales Miners' Federation* v. *Glamorgan Coal Company*[2]. Relationship of parent and child might be a justification. But there is no authority for the position that parental authority can be made a cover for inducing a breach by false and malicious statements. No moral or spiritual consideration referred to in the *South Wales Miners' Federation* v. *Glamorgan Coal Company*[2] could possibly enter into a procurement by dishonest and malicious statements—*Law Quarterly Review*, Vol. XIX, p. 116. In this case, it was an active inducement, not a mere advice, and it was also a breach procured by false and malicious statements.

Osborne—relied upon the considerations referred to in the judgment appealed against, and also submitted that no particulars of the false statements having been given in the plaint, the plaint disclosed no cause of action.

V. Viswanatha Sastry submitted that the compliance with the application for particulars having been directed by the learned Judge to be held over till the determination of the preliminary issue, the other side could not rely upon the particulars not having been supplied.

The Court delivered the following

JUDGMENT :—*The Chief Justice* :—This is an appeal from the judgment of Mr. Justice *Wallis* dismissing the suit upon a preliminary issue: "Does the plaint disclose any cause of action?" The suit is no doubt a peculiar one. So far as I know, it is a case of first impression and the learned Judge points out in his judgment that it is not suggested that such a suit has ever been brought or maintained in any Court in which the common law is administered The suit is one for damages brought against the

1. (1908) 1 Ch. 323 at 350. 2. (1903) 2 K. B. 545

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Chief Justice.

mother of a man who had promised to marry the plaintiff. The plaint set out that the plaintiff Fanny Colquhoun, had agreed to enter into a contract of marriage with the son of the defendant. Then it alleges that the son of the defendant had broken the promise to marry the plaintiff. The allegations in paragraph 6 of the plaint are that the defendant set up the son to make some utterly false and frivolous statements against the plaintiff to justify the refusal and the son finally refused to perform the contract in consequence. Paragraph 8 alleges that the defendant has for some illegal and ulterior purpose of her own maliciously and by false representations and otherwise induced and instigated her son to break the contract and the son refused to perform the contract in consequence. As I have said the suit was disposed of by the learned Judge on the preliminary issue: " Does the plaint disclose any cause of action ? " Therefore we must deal with the case as if we were deciding it on what under the Old English Practice was known as ' Demurrer,' that is, we must assume that every allegation in the plaint is true. The learned judge proceeds in his judgment to discuss the various authorities in which the doctrine, which was first laid down, I think, in *Lumley* v. *Gye*,[1] arose for consideration. He refers to the cases of *Quinn* v. *Leathem*[2] and *Glamorgan Coal Company* v. *South Wales Miners' Federation*[3]. And he also refers to the *National Phonograph Co., Ld.* v. *Edison Bell Consolidated Phonograph Co., Ld.*[4] and to *Allan* v. *Flood*[5]. All these are cases decided by the House of Lords. To the cases discussed by the learned Judge we may had a very recent decision of the House of Lords in *Conway* v. *Wade*[6]. Having finished his discussion of the authorities, the learned Judge proceeds :—" If then the principle of *Quinn* v. *Leathem*[2] is applicable to interference with contracts to do particular acts, is there any ground for excepting interference with contracts to marry and allowing any one, if he can, to procure another not to fulfil his or her promise of marriage? " Then he observes: "The action for breach of promise is, no doubt, rather a peculiarity of the common law" and proceeds:—"In the absence of authority, I am not prepared to hold, and it is unnecessary for the purposes of this case to hold,

1. (1853) 2 E. and B. 216.
2. (1901) A. C. 495.
3. (1903) 2 K. B. 545.
4. (1908) 1 Ch. 335.
5. (1898) A. C. 1.
6. (1909) A.C. 506.

that procuring a breach of promise of marriage can in no case be an actionable wrong." Then the learned Judge goes on: "This is a suit against a mother for procuring a breach of promise of marriage by her son, and I am of opinion that such a suit will not lie, because I think the relation of mother and son is a sufficient justification for the mother's interference to make it not actionable." With all respect I am unable to agree with the learned Judge, because it seems to me that while he was anxious not to extend this particular branch of the law further than it had already been carried under the decisions to which he refers, he did, in effect, extend the law, or at any rate, he has laid down a normal proposition of law, which I am not prepared to accede to. The learned Judge seems to me to hold that the doctrine which is now well established that the procuring of a breach of contract by a third party may be an actionable wrong is not applicable when the breach is a breach of promise to marry, and where the relation between the party who procures the breach and the party who broke the contract is that of mother and son. Now I am not prepared to go so far as that. I am not prepared to say that the mere fact of the relationship of mother and son, in itself, excludes the operation of what is now a well-established doctrine of law. Then later on in his judgment, the learned Judge says: "Nor can such interference" (that is, the interference by a mother with a contract to marry which is entered into between her son and somebody else) "be rendered actionable by alleging and proving that it was 'malicious'. As now settled by the cases already referred to, malice is not the gist of an action." I entirely agree that malice is not the gist of the action. But it may well be that, if malice is alleged and proved, it may displace the protection or the privilege or whatever we may call it, which arises from the relation between the party who procures the breaking of the contract and the party who breaks the contract. Then the learned Judge goes on: "As now settled by the cases already referred to, malice is not the gist of an action such as this, but interference without sufficient justification, and in this case the plaint itself discloses sufficient justification." There again, with all respect, I find myself unable to agree with the learned Judge, because I cannot find within the four corners of the plaint allegations which show sufficient justification in the party who induced the breaking of the contract. It may be that, if an order for particulars had been made (the result of which would be that at the trial the plaintiff would be pinned down to those particulars and would be precluded from giving evidence

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as to matters which were not referred to in the particulars), it may be that, reading the plaint and the particulars, it would appear from what was said in the particulars, or what was not said in the particulars, that the plaint itself discloses sufficient justification on the part of the party who induced or procured the breach of the contract. But, in the absence of particulars and on the plaint as it now stands, I am unable to say that the plaint itself discloses sufficient justification. Then the learned Judge goes on: "The further allegation in paragraph 8 that the defendant procured the breach of promise by false representations does not disclose a cause of action as no false representations are pleaded." It seems to me that in paragraph 8 there is a general allegation of false representation. It may be the particulars of that allegation, if given, would show that the alleged false representations are not of such a character as to disclose a cause of action. But in view of the general allegation of false representation I am unable to say that the plaint does not, *prima facie* at any rate, disclose a cause of action in regard to the false representation. I think the decree must be set aside and the case sent back to the Court of first instance. Costs will abide the event.

Krishnaswami Aiyar J :— I agree in the order of remand. I agree with Mr. Justice *Wallis* in holding that malice is not the gist of the action. But it does not follow from that statement that where a justification is pleaded the presence of malice may not remove the justification. I adopt the statement of law made by SIR FREDERICK POLLOCK at page 329, 8th Edition, of his book on *Torts*. He says: "It cannot be reasonably maintained, for example, that a parent or guardian may not advise his daughter or ward to break off an improvident engagement to an unworthy suitor." But as it is alleged in this case that the breaking of the engagement was procured maliciously and by means of misrepresentations, it seems to me that the person so procuring a breach is not protected. SIR FREDERICK POLLOCK also points out that the disposition of the Courts is to be very cautious in admitting exceptions to the rule of liability for procuring breaches of contract. I am not able to appreciate the view of Mr. Justice *Wallis* that because the defendant in this case stands in the position of mother, therefore, *ipso facto* she is justified in procuring the breach, although it may be she has done so maliciously and by misrepresentations to her son.

Costs will abide the event.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Ramasawmi Aiyangar .. Appellant*
(*Plaintiff*)
v.
Shunmugam Pillai & another .. Respondents
(*Defendants*).

Ramasawmi Aiyangar v. Shanmugam Pillai.

Madras Acts—Rent Recovery Act—Liability for rent — Assignor and assignee—Estoppel—Notice—Distraint, law of.

If the liability to rent is under a contract of lease the lessee would not, by transfer, cease to be subject to the obligations under the lease. But in the case of a kudivaramdar under the Rent Recovery Act a transfer of the holding puts an end to the tenancy without notice to the landlord, though he may be estopped from disputing the continuance of the tenancy under certain circumstances, *e.g.*, where the landlord has delivered pattah for the fasli to the original tenant and has been misled into not tendering it to the successor. But where notice has been as a matter of fact given, whether by the assignor or assignee, no question of estoppel can arise.

The obligation to pay rent attaches to the person who is entitled to the holding at the commencement of the Fasli without reference to the question of the time of payment; and he is the person against whom proceedings may be instituted under the Act.

In India there is no right of distraint under the Transfer of Property Act, and where it exists under the rent law, there is no limitation as to the situation of the goods. Difference between the English and Indian Law of distraint stated.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 544 of 1906 presented against the decree of the Court of the District Munsif of Tanjore in O. S. No. 419 of 1905.

S. Srinivasa Aiyangar for appellant.

S. Varadachariar for respondents.

The facts of the case appear from the judgment.

S. Srinivasa Aiyangar :—The appellant was only a mortgagee. His mortgage was discharged during the first of the Faslis in question. As a mortgagee, puttah could not be tendered to him. Even supposing it could be, he being no longer a mortgagee, his liability ceased.

S. Varadachariar—relied upon *Vithal Narayan* v. *Sriram Savant*[1] for the position that a usufructuary mortgagee is liable to pay rent. Apart from that, he himself having entered into

*S. A, 252 of 1907. 6th May 1910.

1 (1905) I.L.R. 29 B. 391.

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direct relations with the landlord he was estopped from contending that he was not the tenant liable to pay rent. He ought to have given notice of the determination of his interest, or at any rate, so far as the first of the Faslis is concerned, his liability having commenced, it must be taken to continue unless he gives notice.

S. Srinivasa Aiyangar, for appellant, argued that notice was unnecessary—S. A. 1714 of 1908, S A. 1213 of 1906 and S.A. 735 of 1908.[1] Under the law, tender of patta is necessary. Such tender can be made only to a tenant at the time. Continuing relationship of landlord and tenant at the time as well as after, is contemplated by the Act before the remedies under the Act can be resorted to—ejectment, for instance. He referred to Ss. 10, 12, 41, and 26 of the Rent recovery Act in support of this view.

The Court delivered the following

JUDGMENT:—The plaintiff was a usufructuary mortgagee of the tenant's interest in a holding under the Tanjore Palace estate, of which the defendant was the Receiver. He sues for the recovery of a cow and calf distrained by the defendant for the rent of Fasli 1314 and for damages. The mortgage was redeemed by one Raghaviengar, who was the purchaser of the equity of redemption, on the 3rd September 1904. The defendant tendered a puttah to the plaintiff on the 22nd June 1905 and distrained on the 21st August 1905. The plaintiff contends that he was not the tenant under the Rent Recovery Act for the suit Fasli and that the distraint was in consequence illegal. The District Judge is of opinion that as the plaintiff gave no notice of the termination of his tenancy to the landlord the distraint was legal. It has been held by this Court that there is no warrant in Act VIII of 1865 for the view that a tenant, who has validly transferred his holding, continues to be liable for future rent if he has not given notice to his landlord of the transfer. See Second Appeals Nos. 1213 of 1906, 735 of 1908 and 1714 of 1908. A transfer of the holding puts an end to the tenancy without notice to the landlord. Whether he may not be estopped from disputing the continuance of the tenancy under certain circumstances is another question. If the landlord has delivered the puttah to the original tenant for the Fasli in question and has

1. Since reported in 20 M.L.J. 732.

been misled into not tendering it to the successor the former tenant may be bound to pay the rent though he has not taken the produce. But in the absence of estoppel he ceases to be liable after the transfer of the holding. If the liability to rent is under a contract of lease the lessee would not by transfer cease to be subject to the obligations under the lease. See S. 108, Cl. (*j*), of the Transfer of Property Act. But the kudivaramdar who is the tenant under the Rent Recovery Act is not in the same position. Though only a mortgagee, the plaintiff had for many years received puttah from the landlord and executed his *muchilika*. But when the mortgage was discharged he ceased to be the tenant. There is no room for the plea of estoppel, for Raghaviengar, who paid off the mortgage, gave notice of it to the landlord on the 3rd February 1905 (*vide* Exhibit E) and it is immaterial that it did not emanate from the plaintiff.

The respondent, however, argues that the plaintiff was the tenant for the Fasli in question as the discharge of the mortgage was not until the month of September in the Fasli. It is true the instalments of rent are only payable in November but the dates of payment do not affect the fact of tenancy for the Fasli in question. Such tenancy having commenced on the 1st July and it being competent to the landlord to tender a puttah and take a muchilika on that very date, it is impossible to treat the plaintiff as no longer tenant for the Fasli after the transfer of September. Mr. Srinivasa Aiyangar rightly contended that the Act contemplates the tender of puttah only to one tenant of a holding and not to successive holders for the same Fasli. If the plaintiff and not his successor would be liable in case the muchilika was executed by him at the commencement of the Fasli he would not cease to be liable if there was a mere tender of puttah early in the Fasli or the tender was delayed till after the transfer of the holding. It is, however, pointed out that proceedings under the Act contemplate the subsistence of the relation of landlord and tenant when they are initiated and some of the sections of the Act were relied on. We are not satisfied that this view is well founded. Sections 10, 12 and 41 presuppose, it was said, the tenant proceeded against being in possession of the holding. Sections 2, 8 and 9 were referred to as shewing that, at the commencement

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of the proceedings, the parties occupied the relative position of landlord and tenant. Now this line of argument, if sound at all, proves too much. The parties are spoken of as landlord and tenant even when a fresh puttah in pursuance of the Court's decree has got to be tendered or the latter institutes proceedings to set aside a distraint or for the recovery of damages even though at that time he may have parted with the holding. We think we are bound to reject this contention. A tenant is defined by the Act as including all persons bound to pay rent to the landholder. The obligation attaches to the person who is entitled to the holding during the Fasli in question. If we are right in thinking that when the Fasli has commenced the person entitled to the holding at the commencement of the Fasli is bound to pay the rent without reference to the question of the time of payment, he is the tenant against whom proceedings may be instituted under the Act. Suppose a lessee under S. 13 for a term of years assigns the lease after the expiry of some years of the term and is in arrears in respect of those years, is it to be contended that no proceedings under the Act can be taken against him for the arrears of those years because at the time of the institution of the proceedings he has parted with the remainder of the term? We must, therefore, hold that the transfer of the holding in September does not disentitle the landlord to distrain the plaintiff's cattle for the rent o Fasli 1314.

The law with reference to distress in England appears to rest on a different footing and does not afford any assistance in determining a question falling under the Rent Recovery Act. At common law a distress could only be made during the continuance of the demise although the tenant continued in occupation afterwards—*Williams* v. *Stiven* [1]. Section 6 of 8 Anne, Cap. 14, authorized the distraint after the termination of the lease provided it was made within six months thereafter but during the continuance of the landlord's interest and of possession by the tenant. Again it is said the right to distrain depends upon the possession of the legal reversion. See FOA'S *Landlord and Tenant*, p. 485, and *Stavely* v. *Allcock*.[2] The goods distrained must be on the demised premises—Encyclopœdia of

1. (1846) 9 Q. B. R. 14 S. C. 15 L.J.Q. B. 321.
2. (1851) 16 Q.B. 636 S. C. 20 L.J.Q. B. 320.

the Laws of England, Vol. IV, p. 291 (1st Edition)—and the right of distress extends to the goods of a stranger—p. 294. In this country there is no right of distraint under the Transfer of Property Act and where it exists under the rent law there is no limitation as to the situation of the goods. We think the question of legality of distraint in the present case is governed entirely by the provisions of the Rent Recovery Act. As we have already stated, we are of opinion that this distraint was legal. We must dismiss the second appeal with costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*Full Bench.*)

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

Iburamsa Rowthan & others .. Appellants*
v. (*Plaintiffs*)
Thiruvenkatasami Naick (died) and
others .. .. Respondents
(*Defendants*).

Hindu Law—Partition—Partial partition—Right of suit for partial partition by alienee of share of co-parcener in certain items already alienated by others.

When certain items of family properties are conveyed by one of two co-parceners of a Hindu family to a stranger for purposes not binding on the family, the alienee from the other co-parcener of his share in the said properties may, without instituting a general suit for partition of the entire family property, maintain an action for the partition of his share in the said items.

Iburamsa Rowthan v. Thiruvenkatasami Naick.

Second appeal from the decree of the Subordinate Judge's Court of Madura West, in A. S. No. 19 of 1906, presented against the decree of the Court of the District Munsif of Periakulam in O. S. No. 322 of 1905.

The facts appear sufficiently from the order of reference.

This second appeal first coming on for hearing before Mr. Justice Benson and before Mr. Justice Krishnaswami Aiyar the Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

In this case the 1st and 2nd defendants are members of a joint family owning several items of property in common. Some of the items had been sold to the 3rd defendant by the 1st. The plaintiff, having purchased the 2nd defendant's interest in the

* S. A. No. 88 of 1907. 16th August, 1910.

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said items, sues for partition. The Courts below have dismissed the suit as one for a partial partition and therefore not maintainable. The plaintiff appeals. It is an accepted rule of the Hindu law that a suit for partition should embrace the whole family property—*See* MAYNE on *Hindu Law*, page 668 (7th Edition). No tenets of the Hindu Law have been cited nor have we discovered any as regards the foregoing rule. The rule in MANU Chapter IX, Verse 47, "once is the partition of an inheritance made" does not deal with suits for partition whether of the whole or of portions of the common property but only forbids the reopening of a partition once made. KULLUKA BHATTA makes this clear in his commentary on the verse. That it only relates to the prohibition of reopening the partition is made further clear by the further directions contained in the same verse "once is a maiden given in marriage and once does a man say I will give." Verse 218 of the same Chapter of MANU, which provides for the partition of property afterwards discovered, does not necessarily lead to the inference that a partition must be complete—see *Smriti Chandrika*, Chapter 14, paragraph 10. It cannot be denied that it is open to the members of a joint family by mutual consent to divide the properties piecemeal. The prohibition therefore against a partial partition, though administered as a part of the Hindu Law, is more a creature of judiciary law than of the Hindu law-givers. As observed by WEST and BUHLER in their *Digest of Hindu Law*, p. 700—"Though partial division is of very frequent occurrence in practice, the law books do not contain any special rules on the subject." It is on general principles and actual decisions, as observed by the same authors, that the rule against a partial partition is based. It will be seen from the cases collected by MAYNE in Note (*l*) at page 668 and by WEST and BUHLER in Note (*c*) at page 699 that the Courts have always refused to make a partial partition at the instance of one co-parcener against others; nor is the rule confined to co-parcenary property. Even where the parties are only co-sharers or tenants-in-common, partition of certain of the items only has been ordinarily refused, see *Parbati Churn Deb* v. *Ain-ud-deen*[1] and *Ramasami Chetti* v. *Alagirisami Chetti*[2] though, if it could be effected without much inconvenience to other sharers, a

1. (1881) I. L. R. 7 C. 577. 2. (1904) I. L. R. 27 M. 361.

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partial partition has not been held to be absolutely barred. See *Radha Kanta Shaha* v. *Bipro Das Roy*[1] ; *Syed Habibur Rasul Abul Faiz* v. *Ashita Mohan Ghosh*[2]; *Uma Sundari Debi* v. *Benode Lal Pakrash*[3] ; *Duvvada Harikrishna* v. *Venkatalakshmi*[4]. The question, however, is more complicated where a stranger has become the purchaser of the interest of one of the co-parceners. In this case different views have been held according as the suit is by the stranger-purchaser to obtain possession of the share of the vendor by partition or by the member of the family against the stranger to recover his share of the property alienated. In *Venkata Rama* v. *Meera Labai*[5], *Venkayya* v. *Lakshmayya*[6] and *Palani Konan* v. *Masa Konan*,[7] a suit for partial partition by the purchaser of a share of a co-parcener in one item of family property was held not maintainable. The principle of these cases has been stated to be that, as no member of a joint Hindu family can predicate for himself that he is entitled to a particular share until partition, so he cannot also claim any particular part or a share in any item of the family property as his own until a partition is effected and the purchaser of his interest can only be assigned any property as representing the share of his vendor after all the accounts between the members of the family are adjusted and the mutual equities ascertained. In *Appuvier* v. *Rama Subba Aiyan*[8] Lord *Westbury*, delivering the judgment of the Judicial Committee, made the well-known observations about the character of a joint Hindu family— "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided Hindu family could go to the place of the receipt of the rent and claim to take from the Collector or Receiver of the rents a certain definite share. * * * But when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined

1. (1905) I C. L. J. 40.
2. (1908) 12 C. W. N. 640.
3. (1907) I. L. R. 34 C. 1026.
4. (1910) 20 M. L. J. 323.
5. (1890) I. L. R. 13 M. 276.
6. (1893) I. L. R. 16 M. 98.
7. (1896) I. L. R. 20 M. 243.
8. (1866) II M. I. A. 75.

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shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with." It is on this principle that the alienee of the interest of one member of the co-parcenary or even of the interest of a sharer in common property has been held not entitled to sue for the partition of the item alienated without a general partition of the entire common property. It has, however, been held that when a sharer in co-parcenary property sues an alienee from another co-parcener of his interest in a portion of the common family property, he is entitled to recover his share in the property alienated. See *Venkatachella Pillay* v. *Chinnaiya Mudaliar*[1]; *Chinna Sanyasi* v. *Suriya*[2] and *Subramania Chettyar* v. *Padmanabha Chettyar*[3]. It may at first sight seem difficult to account for the difference. It may be asked why should there not be equities amongst the members of the family to be adjusted which might result in the alienee getting no portion of the property transferred to him. It may also be asked why should not the equity in favour of the purchaser require the assignment of the entire property and not merely of a share to the purchaser. There is authority in favour of the purchaser's equity being so worked out. See *Koer Hasmat Rai* v. *Sunder Das*[4] and *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya*[5]. But if the purchaser of the interest of a co-parcener in a part of the family property has not sued to enforce a partition and the assignment of the whole of the items alienated in consequence of the equities in his favour, the other co-parceners are not precluded from recognising the transaction as valid to the extent of the share of the alienor and seeking a division of their shares in the property transferred, reserving for a future occasion the enforcement of their right to a partition of the remaining common family property. The authority of the Madras cases above referred to has been too well established to be questioned at this time of the day. A difficulty, however, has been felt as regards cases where all the co-parceners have severally alienated their respective interests in some items of common family property. In *Subbarazu* v. *Venkataratnam*, [6] it was pointed out that a suit between purchasers of the interests of the co-parceners is not governed by

1. (1869) 5 M.H.C.R. 166.
2. (1882) I. L. R. 5 M. 196.
3. (1896) I. L. R. 19 M. 267.
4. (1885) I. L. R. 11 C. 396.
5. (1902) I. L. R. 25 M. 690 at p. 718.
6. (1892) I. L. R. 15 M. 234.

the principle of the decision in *Venkatarama* v. *Meera Labai* [1] against the purchaser of the interest of the sharer in some items of family properties suing for a partial partition. In that case, however, the plaintiff-purchaser had acquired the title of all the co-parceners and sued to eject a mortgagee with possession of the moiety of one of the shares and the suit was not one for a partition. In *Kadegan* v. *Periya Munusami* [2] it was held that the alienee from one member of the co-parcenary of his interest in some of the family properties could sue for partition of his vendor's share against a purchaser in Court sale of the interest of the other co-parcener. These cases rest on the principle that, as the co-parcener could sue the stranger for his share of the items conveyed by another co-parcener, he could transfer that right to another by disposing of his share in the property to that other. The case *Kristayya* v. *Narasimham* [3] is not reconcilable with this principle. That decision proceeds on the ground that the alienees from each co-parcener cannot get their rights ascertained until the equities between the alienors are adjusted. We must therefore refer, for the opinion of the Full Bench, the following question:—"Whether when certain items of family properties are conveyed by one of two co-parceners of a Hindu family to a stranger for purposes not binding on the family, the alienee from the other co-parcener of his share in the said properties may, without instituting a general suit for partition of the entire family property, maintain an action for the partition of his share in the said items?"

T. R. Venkatarama Sastri and *R. Rengaswami Aiyangar* for appellants.

The Advocate-General (*P. S. Sivaswami Aiyar*) for respondents.

T. R. Venkatrama Sastri:—There are four classes of suits: (1) member against member, (2) alienee against member, (3) member against alienee, and (4) alienee against alienee. In the first two there cannot be a partial partition. In the 3rd class there can be a partial partition. In addition to the cases quoted

1. (1890) I. L. R. 13 M. 275
2. (1903) 13 M. L. J. 477.
3. (1900) I. L. R. 23 M. 608.

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in the Order of Reference I rely on Ap. 39 of 1906[1]. The fourth must follow the third—*Subbarazu* v. *Venkataratnam* [2]; *Kadegan* v. *Periya Munisami*[3]; *Kristayya* v. *Narasimham*[4]; *Bunwari Lal* v. *Dayasankar Missur*[5]. As for a decision for class (4) see a case in Bombay Printed Judgments, of 1883, that is referred to in *Shivmurtappa* v. *Virappa* [6] at p. 134. As regards *Kristayya* v. *Narasimham*[4] it was not a suit for partial partition as all the items that could be partitioned were in suit. The other items there were usufructuarily mortgaged. Dealing with equities, the rule laid down in that case is an exception to the class of cases such as those referred to in *Subbarazu* v. *Venkataratnam*[2]. That is how I explain it. *Subbarazu* v. *Venkataratnam*[2] contains only an observation in my favour. There is an observation by Justice *Ranade* in *Shivmurteppa* v. *Virappa*[6] which is against my view. Of class 4, the decision in *Suraj Bunsi Koer* v. *Sheo Persad Singh* [7] is impliedly in my favour.

The Advocate-General:—In none of the cases referred to in the Order of Reference was the equity of the purchaser referred to. That is referred to in *Aiyagari Venkataramayya* v. *Aiyagari Ramayya*[8]. [*Aiyar* J.—Why is it that it has been held that a purchaser should sue for a general partition when he is content to have only the share of his vendor in the property sold ?] The equity in favour of the other members or the impracticability of assigning that share in the particular property to the purchaser. [*Aiyar* J.—Why should other members who are willing to be joint be compelled to a have a general partition simply to suit your convenience, especially when you are defendant?] Because I am in possession of the whole and am entitled to maintain that if possible ; and this can be done only in a general partition. [*Aiyar* J.—The equity you invoke can be had for you only if a suit for partition is filed by one member. You are in unlawful possession of the share which did not belong to your vendor.] I am in lawful possession, for that could be assigned to me

1. Since reported in 20 M.L.J. 759.
2. (1892) I.L.R. 15 M. 234.
3. (1903) 13 M.L.J. 477.
4. (1900) I.L.R. 23 M. 608.
5. (1909) 13 C.W.N. 816.
6. (1899) I. L. R. 24 B. 128, 134.
7. (1879) I.L.R. 5 C. 148 (P.C.)
8. (1902) I.L.R. 25 M. 690.

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in a general suit for partition. [*Aiyar* J.—That is only in future. Your equity is like that of a mother's right to a share in Bengal if a partition is made among the sons.] [*T. R. V. Sastri*.—The right of the purchaser is only to work out his right by a suit for partition; getting into possession is of no effect.—*Hardeo Narain Sahu* v. *Rudar Perkash Misser*[1].] The right of a purchaser is discussed in *Kadegan* v. *Peria Munisami*[2].

T. R. Venkatarama Sastri:—The idea of doing equity to the purchaser was present to the minds of the Judges in *Subramanya Chettiar* v. *Padmanabha Chettiar*[3].

The Full Bench delivered the following

OPINION :*—The facts are sufficiently set out in the order of reference. It is unnecessary to recapitulate them here. We may begin with the proposition that a member of an undivided Hindu family cannot enforce a partial partition against the other members of the family. That is not disputed. The next proposition which is also beyond question is that a stranger purchasing the interest of one or more members of the family in certain items of family property cannot enforce a partition of those items only against the will of the other members without suing for a general partition of the entire family property. The principle of this rule is that there may be equities which those other members have against the vendor of the plaintiff which can only be worked out in a general suit for partition and in working out those equities the plaintiff's vendor and hence the plaintiff may be assigned a different item from the items he purported to buy or even a smaller share than those items represented. We come next to the suit by a member of the family against the purchaser of a part of the family property for the recovery of his share in the part alienated without claiming a division of the entirety of the family property. Such a suit has been held to lie in a series of cases as pointed out in the referring order. We may add two further cases in support of the same view —Appeal 39 of 1906[4] and *Bunwari Lal* v. *Dayasunker Misser*[5] If this view be correct the learned Advocate-General does not impugn, what is almost

* 16th August 1910.

1. (1883) I.L.R. 10 C. 626. (P.C.)
2. (1903) 13 M. L. J. 477.
3. (1896) I.L.R. 19 M. 267.
4. Since reported in 20 M.L.J. 759.
5. (1909) 13 C. W. N. 816.

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a corollary from it, that the purchaser from a member of his share of property alienated by others, can sue the alienees of those others for the share of his vendor in that property unless the alienation bound the entire family interest. The reasoning in *Subbarazu* v. *Venkataratnam* [1] and *Kadegan* v. *Periya Munusami* [2] fully supports this inference. But the learned Advocate-General disputed the correctness of the rule that a member of an undivided family could sue for his share in the item alienated to a stranger-purchaser of that item without asking at the same time for a general partition of the entire family property. The authorities laying it down he challenged as unsound and as opposed to the view expressed in *Udaram Sitaram* v. *Ranu Panduji* [3] and in *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya* [4] that the equities of the purchaser might entitle him to the whole property purchased by him and not merely to the share of his vendor, and that he could therefore insist on a general partition of the whole property of the family as the only means of working out those equities. Those cases, however, do not lay down that the member of the family suing for his share could be driven by the purchaser from another sharer to institute a suit for general partition. They are only authority for the position that in a suit for general partition the purchaser could claim to have the equities so adjusted that the entire item bought by him might be assigned to him as for his vendor's share. The decision in *Kristayya* v. *Narasimham* [5] does not question the correctness of the chain of authorities laying down the rule that it is competent to a member to sue the purchaser from another member for his share in the items sold. In that judgment there is only reference to one of the cases establishing the rule, namely, *Subramania Chettiar* v. *Padmanabha Chettiar*, [6] and that also not as bearing on the rule mentioned. There was no intention to depart from the principle on which *Subbarazu* v. *Venkataratnam* [7] had been decided, for that case is evdently referred to with approval. It was apparently assumed that the equities between the members of the family, who were all parties, would have to be gone into in that case, having

1. (1892) I. L. R. 15 M. 234.
2. (1903) 13 M. L. J. 477.
3. (1875) 11 B. H. C. R. 76.
4. (1902) I.L.R. 25 M. 690 at pp. 715 & 716.
5. (1900) I.L.R. 23 M. 608.
6. (1896) I.L.R. 19 M. 267.
7. (1892) I.L.R. 15 M. 234.

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regard to the pleadings. We cannot, therefore, treat that case as any authority in support of the learned Advocate-General. Indeed he made no attempt to rely on it. It may also be pointed out that in view of the final result of that case on the finding that the family had no property besides that in suit the observations as to the form of the suit became unnecessary. We should feel disinclined to depart from a long established rule as to the proper method of working out the rights of members of an undivided family against strangers who have acquired the interests of other members even if we were not satisfied as to its soundness. But our attention has been drawn by the learned vakil for the appellant to the form of decree in two decisions of the Privy Council—*Suraj Bunsi Koer v. Sheo Persad Singh*[1] and *Hardey Narain Sahu* v. *Ruder Perkash Misser* [2]. In those two cases the suits were instituted by the sons against a purchaser in execution of a decree against the father. It was held that the proper decree was to confirm the plaintiffs' possession of the property or to decree to them possession of it against the purchaser, " leaving it to the purchaser to work out the rights which he has acquired by means of a partition"—*Suraj Bunsi Koer* v. *Sheo Persad Singh* [1] Their Lordships added a declaration in each case that the purchaser had acquired the interest of the judgment-debtor and " was entitled to take proceedings to have it ascertained in partition"—*Hardey Narain Sahu* v. *Ruder Perkash Misser* [2] and *Suraj Bunsi Koer* v. *Sheo Persad Singh.*[1] In *Deen Dyal's* case[3], which was a suit of a similar character, but where the father too was alive and a party to the suit, the same decree for possession was made with a like declaration in favour of the purchaser. These decisions are clear authority for the position that the existence of any equities in favour of the purchaser does not entitle him to resist the claim of the members not bound by the alienation to possession. In Madras where the share of the members not affected by the alienation has been allowed to be recovered there is no reason for refusing the more limited prayer for possession of that share. We must answer the question referred to us in the affirmative.

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1. (1879) I. L. R. 5 C. 148 (P. C.) 2. (1883) I.L.R. 10 C. 626 (P C.)
3. (1877) I.L.R. 3 C. 198 (P.C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sankaran Nair.

Seshappaya .. Plaintiff*
v. (*Appellant*)
Venkatramana Upadya & another .. Defendants
(1 & 3 *Respondents*).

Seshappaya v. Venkatramana.

C.P.C., (XIV of 1882) *S.* 13—" *Parties under whom they or any of them claim* "—*Mulgeni-chit before suit—Landlord and Tenant—Decision not binding on mulgenidar.*

The decision in a prior suit binds the party to the subsequent suit only in respect of interests represented by the party to the former suit at the time of suit. Other interests with which he had parted before the suit and which he had ceased to represent could not properly be the subject of adjudication in the suit, and the question in each case is whether the interests in the subsequent suit were represented in the former suit by the party under whom the claimant holds in the second suit and if they were so represented it does not matter whether they rested in the privy before or after the former suit.

A mulgeni interest is not an interest subordinate to that of the lessor or mulgar, and a mulgar cannot be said to represent the interests of a mulgenidar who had taken the chit before suit, within the meaning of S. 13, C. P. C. [*Sitaram* v. *Amir Begam*[1] referred to.]

Second appeal from the decree of the Subordinate Judge's Court of South Canara in A.S. No. 123 of 1905 presented against the decree of the Court of the District Munsif of Kundapur in O. S. No. 458 of 1904.

The suit was for possession of land. The allegations in the plaint were *inter alia* that in execution of a decree obtained by the plaintiff against one Shesha Navada, plaintiff purchased the plaint property ; that he took delivery of the same but was subsequently dispossessed by the defendants. The case of the defendants was that the property was sold by Shesha Navada to one Ganapayya Urala under a sale deed dated 3rd May 1893, long before the plaintiff's attachment, and that subsequently on the 1st June 1899 (this too before the plaintiff's attachment) the said Ganapayya Urala executed a mulgeni chit in favour of the 1st defendant who has been in law in possession ever since.

The further facts were that the said Ganapayya Urala had put in a claim petition objecting to the attachment by the plaintiff, that the same had been dismissed and that also a subsequent

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*S. A. No. 386 of 1906. 5th January 1910.

1. (1886) I.L.R. 8 A. 324.

suit brought by him for a declaration that his sale was valid and binding had been dismissed. The material issues were: (i) Whether the suit land is enjoyed by 1st defendant on mulgeni granted by GanapayyaUrala and whether it is binding upon the plaintiff. (ii) Whether the proceedings in Execution Case 128 of 1903 were binding on the defendant. The Court of the first instance held that the decision in the claim petition and the suit was not binding against the 1st defendant and that the sale to Ganapayya was *bona fide* and real and that the mulgeni in favour of the 1st defendant was also real and had been acted upon and accordingly dismissed the suit. Seshappay v. Venkat-ramana.

On appeal, the Sub-Judge held on the authority of *Sitaram* v. *Amir Begam*[1] that the decision in the previous suit was not *res judicata* and also that there being no evidence that there were any creditors of Shesha Navada to be defeated except those that Ganapayya Urala had been asked in his sale deed to pay off and even assuming that the sale deed was executed fraudulently, there was nothing to shew that the 1st defendant participated in the fraud, and that his mulgeni right must be respected. He also held that the effect of the previous decision was that the plaintiff was entitled to the reversion and was entitled to recover the rent from the 1st defendant. Plaintiff appealed.

B. Ramanatha Shenai for appellant.

B. Sitarama Rao for respondent.

K. Ramanatha Shenai, for appellant, argued that the previous decesion was *res judicata*; that the decision in *Sitaram* v. *Amir Begam*[1] showed that it would not be *res judicata* only by the insertion of some words in S. 13, C.P.C., which were not there; that the 1st defendant was aware of the previous proceedings and had even given evidence in the case and as such was estopped from questioning the decision that the sale deed was a colorable transaction for the reasons given in the previous judgment, and that the case made out by the Sub-Judge as to *bona fide* dealing with ostensible owner was a new one.

B. Sitarama Rao, for respondent, contended that on the question of *res judicata* S. 13 itself was so clear that it was not necessary to import any words into the section; at the date of the suit Ganapayya Urala had not the entire interest in

1. (1886) I.L.R. 8 A. 324

Seshappaya v. Venkatramana.

him ; he had only the entire interest minus the mulgeni interest of the 1st defendant; that in no sense the 1st defendant claimed under Ganapayya Urala; that the words "litigating under the same title" make it clear that interests already carved out are not affected; and also relied upon *Sitaram* v. *Amir Begam*[1], *Ahmedbhoy* v. *Vulleebhoy*[2], *Rambrohmo* v. *Bunse Kurmokur*[3], *Bonomaly* v. *Koylash Chunder*[4], *Lakshman* v. *Sitaram*[5], *Soshi Bhushan* v. *Gagan Chunder*[6], *Karuthasami* v. *Jagannatha*[7] and Hukm Chand on *Res Judicata*, p. 185; SMITH's *Leading Cases*, Vol. II (11th EDN.), p. 762; *Foster* v. *Lord Derby*[8], *Satterlee* v. *Bliss*[9], *Mercantile Investment and General Trust Company* v. *River Plate Trust, London Agency Company*[10]. He relied upon the last case for the position that even the financing of the litigation by the assignee before suit would not estop him from questioning the correctness of the decision against the assignor.

The Court delivered the following

JUDGMENT:—In O. S. No. 77 of 1900 on the file of the District Munsif of Kundapur, Ganapayya Urala having been defeated on a claim petition arising out of an attachment made by the present plaintiff, sued the present plaintiff to establish title to the property attached. The suit was dismissed on a finding that the conveyance on which he founded his title, a sale by the owner Shesha Navada, was fraudulent and not intended to convey any interest. The decision was affirmed on appeal. The plaintiff now sues, alleging that after the dismissal of Ganapayya Urala's suit, he brought the attached property to sale and purchased it himself and obtained possession; but was dispossessed by the 1st defendant, who set up a mulgeni tenure under Ganapayya Urala. This suit is, therefore, for recovery of the land, and it has been dismissed on the ground that the 1st defendant is entitled to possession as mulgenidar. It is found *inter alia* that the first defendant has remained in possession ever since the mulgeni tenure was created, and that the plaintiff's allegation that he obtained actual possession is not true.

1. (1886) I. L. R. 8 A. 324.
2. (1882) I. L. R. 6 B. 703
3. (1882) 11 C.L.R. 100.
4. (1872) I.L.R. 4 C. 696.
5. (1880) I.L.R. 5 B. 496.
6. (1894) I.L.R. 22 C. 371.
7. (1885) I.L.R. 8 M. 478.
8. (1834) 1 A. & E. 783.
9. 36 California 489.
10. (1894) 1 Ch. 578.

Seshappaya v. Venkatrammana.

The first question for decision in the second appeal is whether the first defendant is bound by the decision in the suit of 1900, in which it was held that Ganapayya Urala had no title. If he is so bound, the plaintiff's title cannot be questioned in this suit, and, apart from any question of dispossession, the plaintiff will be entitled to succeed on his title. The question is whether the 1st defendant is a person who claims under Ganapayya Urala within the meaning of S. 13 of the Code of Civil Procedure. The ground of privity is stated by the learned author of BIGELOW on *Estoppel* to be property and not personal relation (P. 142, Vth Edition) and this view is accepted by *Mahmood* J. in *Sita Ram* v. *Amir Begam*[1]. The successor to or purchaser from a party becomes a privy only in respect of the interests and rights in property to which he has succeeded or which he has purchased.

And it is not to be supposed that the Civil Procedure Code contemplates the adjudication, between the parties to a suit, of interests or other rights, which are not theirs, and are not represented by them. Consequently, though the words 'under whom they or any of them claim' in S. 13 of the Code of the Civil Procedure are wide, there seems to be no difficulty in the way of restricting them so as to bind the party to the subsequent suit by the decision in the former suit only in respect of interests represented by the party to the former suit at the time of suit. Other interests with which he had parted before the suit and which he had ceased to represent could not properly be the subject of adjudication in the suit.

In an Irish case *In re Burgho's Estate*[2] *Madden* J. lays down and explains the rule as follows:— "According to the clear principles of the Law of Estoppel it is necessary in order to estop the objector, to show that he derived title by act or operation of law subsequent to the recovery of the judgment. If this is shewn, it is reasonable that he should be estopped, because his estate was represented at the time of the recovery of the judgment though not in his person."

The question then in each case is whether the interest in suit was represented in the former suit by the party under whom the claimant holds in the second suit, and we apprehend that,

1. (1886) I. L. R. 8 A. 324.
2. (1896) Ir. R. 274.

Seshappaya v. Venkatrammana.

if it was so represented, it does not matter whether it rested in the privy before or after the former suit. In *Sashi Bhushen Guha* v. *Gogan Chunder Saha* [1] the learned Judges explain the law that a decision against a Hindu widow will conclude her husband's heirs on the ground that the widow represents the whole estate, and the same view is expressed by *Mahmood* J. in *Sita Ram* v. *Amir Begam*,[2] and the ground on which this question was decided in favour of the mortgagee in those two cases as well as in *Bonomalee Nag* v. *Koylash Chunder Dey* [3] is that the mortgagor after the mortgage cannot represent the estate vested in the mortgagee. The test is whether the interest is represented and if it be possible that the party represents in the suit an interest already vested in some one else, that person will be a privy. Though the rule is stated in BIGELOW on ESTOPPEL (5th Edition, page 142) with reference to the time at which the interest becomes that of the successor of, or purchaser from, the party, it is recognized by the learned author that there may be cases to which this consideration will not apply, and these he includes in what he calls 'holding subordinately.' "To make a man privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance or succession or purchase from a party subsequently to the action, or he must hold property subordinately", and as an instance of a subordinate holding he takes the case of landlord and tenant: "a lawful judgement," he says, "which deprives the landlord of the estate, deprives the tenant, of necessity, of his subordinate right." (page 143.)

Thus the view of the learned author would seem to be that the landlord necessarily represents the interest of the tenant in an action so far as that interest is subordinate.

We do not know of any English or Indian authority in support of this view; the rule that the interest, to be bound, must be acquired after the action, is supported by the English cases of *Dod Thomas Foster* v. *Lord Derby* [4] and *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan and Agency Company*,[5] and many American cases are cited in

1. (1895) I. L. R. 22. C. 364 at p. 372.
2. (1886) I.L.R. 8 A. 324.
3. (1879) I.L.R. 4 C. 692.
4. (1834) I.A. & E. 509.
5. (1894) 1 Ch. 578, 595.

Seshappaya v. Venkatrammana.

support of it in the work we have quoted. In Hukm Chand on *Res Judicata* we find cited an American case in which it was held that a tenant of a defendant in ejectment who had acquired his lease before the commencement of the suit is not estopped as to his term by a judgment in the suit againt his lessor (page 185). This seems to take a view contrary to that of Dr. Bigelow, but the case is not cited in the 5th Edition of his work nor have we been able to obtain the report of it.

Neither of the English cases to which we have referred relates to landlord and tenant, but in the Irish case the title of the objector, who was held not to be estopped, was derived from a lease for lives renewable for ever. This may, however, be distinguishable from the case of ordinary tenancies from year to year or for years. In the present case it is not necessary for us to decide on the soundness of the view that a tenant may be represented by his landlord in so far as his holding is subordinated. It is contended that a mulgeni holder must be treated as a tenant and be bound as such, but the mulgeni tenure is a permanent heritable tenure, alienable in some cases by the conditions of the mulgeni chit, but in all cases perpetual though subject to forfeiture in certain cicumstances. The instrument in the present case is not before us, but it is not suggested that it creates anything less than an ordinary mulgeni interest.

The lessor has, when the interest is inalienable,a reversion or a 'possibility of reverter' and a right to an annual rent, but he cannot determine the tenancy by notice, nor will it be terminated by efflux of time. Consequently, it cannot, in our opinion, be properly said that the mulgeni is an interest subordinate to that of the lessor. It is certainly greater than that of a simple mortgagee who has not the possession and who can be redeemed at any time, after the mortgage money is due; yet if *Sita Ram* v. *Amir Begam*[1] is right, the simple mortgagee is not estopped by a decision against the mortgagor in a suit instituted after the mortgage.

It seems to us that the lessor having alienated in perpetuity his right to possession, and having reserved to himself only a right to receive a rent cannot be said to have represented the

1. (1886) I. L. R. 8 A. 324.

Seshappaya v. Venkatram-mana.

interest of the mulgenidar in the suit between himself and the plaintiff.

It follows that the lower Courts were right in holding that the defence is not barred. It is then contended that the defendant is estopped in a different way. In the former suit he was a witness for Ganapayya Urala and he did not then,or before the execution sale, bring his mulgeni interest into Court. This conduct, if it is to create an estoppel, must be found to have misled the plaintiff. He must show that he purchased the property in the belief that the defendant had abandoned his right to defend his mulgeni tenure, for there is no doubt that he knew, during the progress of the former suit, that the mulgeni was set up. The instrument was filed in the suit (Judgment Exhibit E.) There is no issue on this question, but no doubt, if it were shown that Ganapayya Urala in his suit was suing on behalf of the defendant —that the defendant was then the real plaintiff—the defendant might be bound, but we do not find that alleged anywhere.

We think this contention fails. Nor can the defendant rely on S. 41 of the Transfer of Property Act: that question also was not raised by the defendant before the District Munsif, and as Shesha Navada remained in possession until turned out by the 1st defendant himself, this section cannot be said to be applicable.

The remaining question is a question of fact. Had Ganapayya Urala any title to the land on which he gave the mulgeni? The District Munsif finds that he had, and if paragraph 5 of the Subordinate Judge's judgment can be read as a finding on this question, he must be taken to be of the same opinion. It does not, however, follow from the fact that Shesha Navada was not pressed by creditors, that he intended to sell all his property to his brother-in-law for Rs. 1,000. In the former suit there seems to have been evidence that the conveyance was put in Ganapayya's name to deter others from lending, and that this was done at the instance of Shesha Navada's family. That evidence is not evidence in this case, but we mention it to shew that the object of a sham conveyance is not necessarily confined to the provision of a shield against present creditors.

We cannot,therefore, accept paragraph 5 of the Subordinate Judge's judgment as a finding that Ganapaya had title in June

1899, and we must call upon the District Judge of South Canara for a finding on the 1st of the issues settled by the District Munsif in the light of the above observations.

The finding should be submitted in six weeks and seven days will be allowed for filing objections.

In compliance with the above order the District Judge submitted the findings which were accepted and the second appeal was dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Garapaty Venkatarayudu, Minor, by next friend Kamma Butchi Pattabhiramaya .. Appellant*

v.

Butchu Venkatarayudu & another .. Respondents.

Venkatarayudu v. Venkatarayudu.

Specific Relief Act, S. 42—Hindu joint family—Suit for declaration that decree and sale on a mortgage not binding without prayer for partition—Bar.

A suit by a co-parcener in a Hindu joint family for a declaration that a decree obtained on a mortgage executed by his father and sale thereon were not binding on his share on the ground of illegality or immorality of the father, the executant of the deed, is barred by S. 42 of the Specific Relief Act, for want of a prayer for partition. [*Chinna Sanyasi* v. *Suriya*[1]; *Subramania Chettiar* v. *Padmanabha Chettiar*[2], *referred to.*]

Appeal from the decree of the Court of the Subordinate Judge of Cocanda in O. S. No. 47 of 1905.

Suit for declaration that the mortgage deed and decree in O. S. No. 28 of 1901 on the file of this Court (Sub-Court, Cocanada) and the subsequent execution proceedings therein are not valid and binding against the plaintiff or his share.

The plaint sets forth that the plaintiff is the undivided son of the 2nd defendant; owing to vicious habits of the 2nd defendant, the plaintiff has been residing with his maternal uncle from 1893; the family property of the plaintiff and 2nd defendant, both movable and immovable was worth Rs. 20,000, and the net income per annum was Rs. 1,100-0-0 ; the 2nd defendant was addicted to drink, leading an extravagant and reckless life, contracting unnecessary debts, and wasting family property for immoral purposes;

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* A. No. 39 of 1906 3rd February 1910.

1. (1882) I.L.R. 5 M. 196. 2. (1896) I.L.R. 19 M. 267.

Venkatarayudu v. Venkatarayudu.

2nd defendant borrowed Rs. 7,000 from the 1st defendant and mortgaged the family property, and the latter obtained a decree on the strength of the said mortgage deed in O. S. No. 28 of 1901 on the file of this Court and brought the properties under mortgage to sale and purchased some of those properties; the plaintiff, through his next friend, recently became aware of the said mortgage decree and execution proceedings and filed C. M. P. No. 1355 of 1902 to set aside the said decree so far as the plaintiff was concerned, but he was referred to a regular suit. Hence this suit.

1st defendant, denying the plaint allegations, stated that the suit was not maintainable under S. 42 of the Specific Relief Act inasmuch as he omitted to sue for partition and possession of his share of the suit lands but merely sued for declaration. 2nd defendant was declared *ex parte*.

The question was whether this suit for mere declaration was not maintainable under S. 42, Specific Relief Act. This issue was found in the negative. Hence the appeal.

K. P. Madhava Rao for appellant.

P. Narayanamurti for respondent.

The Court delivered the following

JUDGMENT:—*Chinna Sanyasi* v. *Suriya*[1] and *Subramania Chettiar* v. *Padmanabha Chettiar*[2] are clear authority that the plaintiff was entitled to sue for partition and recovery of his share of the property purchased by 1st defendant. This is a further relief other than a mere declaration of title which the plaintiff was entitled to ask for, and this being so, his suit for a mere declaration is bad.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnasawmi Aiyar.

Josiam Thiruvengada Chariar & another .. Appellants* (*Plaintiffs*)

v.

Samia Iyengar *alias* Venkatachariar (deceased) & another .. Respondents. (*Defendants*).

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* S. A. No. 1583 of 1907. 10th February 1910.

1. (1882) I.L.R. 5 M. 196

2. (1896) I.L.R. 19 M. 267.

Thiruvengada Charia v. Samia Iyengar.

C.P.C., O 22, r. 1 (O.C., Ss. 397, 582)—Abatement—Suit for injunction—Dismissal of suit—Appeal—Death of respondent pending appeal—No survival of appeal for costs.

If an appeal abates on account of the death of the respondent (*e.g.* as in a suit for an injunction against the deceased defendant) the costs which the appellant was made liable to pay on the dismissal of his suit in the first Court cannot form the subject-matter of a continuing appeal.

Second appeal from the decree of the District Court of Trchinopoly in A. S. No. 142 of 1906, presented against the decree of the Court of the District Munsif of Srirangam in O. S. No. 399 of 1904.

R. Rangasawmi Aiyangar for appellants.

T. R. Krishnasawmi Aiyar for respondents.

Plaintiffs brought a suit for an injunction against defendants restraining them from preventing plaintiffs standing at a particular place in the Srirangam Temple. Both the lower Courts dismissed the suit as not cognizable by the Civil Courts. Plaintiffs appealed. Pending appeal the 2nd defendant died. His widow was brought upon the record.

T. R. Krishnaswami Aiyar took a preliminary objection on behalf of the widow that the appeal abated on the ground that the right to sue did not survive after the death of the 2nd defendant.

R. Rangasawmi Aiyangar:—Though I cannot get the relief of injunction in the appeal, I am entitled to show that the decree is wrong for the purpose of getting rid of the liability for costs. To the extent of costs decreed the estate of the deceased has derived benefit. The following cases were cited, *viz.*, *Paraman Chetty* v. *Sundaraja Naicker*[1]; *Gopaul* v. *Ramachandra.*[2]

T. R. Krishnasawmi Aiyar replied.

The Court delivered the following

JUDGMENT:—This is a second appeal by the plaintiffs against the 2nd defendant. The latter having died pending the second appeal, his widow has been brought upon the record. She raises the preliminary objection that the second appeal has abated on the ground that the right to sue did not survive after the death

1. (1902) I.L.R. 26 M. 499,

2. (1902) I. L. R. 26 B. 597.

Thiruvengada Chariar v. Samia Iyengar.

of the original 2nd defendant. The suit was brought for an injunction against the 2nd defendant restraining him from preventing the plaintiffs standing at a particular place in the Srirangam Temple. It is conceded by the appellants' Vakil that he has no right to prosecute the appeal as regards the injunction after the death of the 2nd defendant, but he contends that the Courts below have dismissed his suit with costs, that his estate has lost, and the estate of the 2nd defendant has gained to the extent of the costs awarded, and that he is therefore entitled to continue the second appeal against the 2nd defendant's representative to get rid of the liability imposed upon him by the action of the Courts below. We think the preliminary objection is well founded.

The case has to be decided with reference to the provisions of the repealed Code as the 2nd defendant died in 1908. It is provided by S. 361 that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Section 582 authorizes, in the case of appeals, the substitution of "appellant" for "plaintiff," "respondent" for "defendant," and "appeal" for "suit." Making the necessary changes then, we may read the section as follows :—"The death of an appellant or respondent shall not cause the appeal to abate if the right to sue survives." Section 582 does not in terms authorize the substitution of the verb "appeal" for the verb "sue" and therefore strictly speaking, we have no warrant for reading the section as if it ran :—" The death of an appellant or a respondent shall not cause the appeal to abate if the right to appeal survives." It was, however, held by this Court in *Paraman Chetty* v. *Sundaraja Naick* [1], where in an action for malicious prosecution a decree for damages had been passed by the Court below and the plaintiff-respondent died pending the appeal, that the defendant could continue his appeal as the right to appeal survived against the representative of the plaintiff. The ground of decision was that after the judgment for damages the estate of the respondent was liable to be enriched by the amount of the decree for damages and that the appellant was entitled to get rid of the liability imposed upon him although an action for malicious prosecution was a personal action that would not

1. (1902) I.L.R. 26 M. 499.

Thiruvengada Chariar v. Samia Iyengar.

survive the death of the party suing or sued. In deciding as above, this Court followed the view of the majority of the Bombay High Court in *Gopaul* v. *Ramachandra*[1]. In *Phillips* v. *Homfray*[2] it was observed by *Bowen*, Lord Justice: "It is of the essence of the rule, *viz.*, *actio personalis moritur cum persona*, that claims which are indeterminate in their character shall not be pursued against the estate of the person after his death. If the claim is one for unliquidated damages and *has not been perfected by judgment* at the time of the death of the defendant, the rule applies." This observation of the learned Lord Justice would seem to lead to the inference that if in an action for libel or malicious prosecution a decree for damages has been made, the defendant aggrieved by the decree and appealing against it would be entitled to continue it notwithstanding the death of the plaintiff-respondent. To the same effect are the remarks of *Edge*, C. J., in *Muhammad Hussain* v. *Khushalso.*[3] But it does not appear to follow from these decisions that a plaintiff mulcted in costs in such an action dismissed and incompetent to prosecute his appeal for damages would be entitled to maintain an appeal for the setting aside of the decree for costs which was consequent on the dismissal of the action. In *Pulling* v. *Great Eastern Railway Co.*,[4] which was an action for personal injuries sustained by the running over of an engine, by the plaintiff's husband, it was held that there was no right of action to the representative of the deceased merely because there was damage to the estate of the deceased arising from expenses for medical attendance. It was pointed out by *Denman* J. that none of the authorities go so far as to say that where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. In *Krishna Behary Sen* v. *The Corporation of Culcutta* [5] Mr. Justice *Henderson* held that an action for damges for malicious prosecution could not be continued after the death of the plaintiff because of the pecuniary loss sustained by reason of the expenses of defending against the criminal prosecution.

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1. (1902) I.L R. 26 B. 597.
2. (1883) 24 Ch. D. 439.
3. (1886) I.L.R. 9 A. 131 at 134.
4. (1882) 9 Q.B.D. 110.
5. (1904) I.L.R. 31 C. 406.

Thiruvengada Chariar v. Samia Iyengar.

Applying the principle of these cases, which we take to be that if the action fails, what is incidental to it must fail also, it appears to us that if the appeal abates because the appellant can no longer claim the injunction he prayed for against the deceased 2nd defendant, the costs he was made liable to pay as a consequence of the dismissal of his suit could not form the subject-matter of a continuing appeal. It was said that an appeal might be preferred for costs alone. But this is not as of course, for no such appeal on a mere question of costs is ever entertained unless there is a legal principle involved. And if the appellant cannot prosecute his appeal for the injunction he cannot be allowed to show that the decree refusing the injunction was wrong for the mere purpose of getting rid of the direction as to costs. We must, therefore, hold that the appeal abates. The representative of the 2nd defendant is entitled to her costs against the appellant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Jutsice Benson and Mr. Justice Krishnaswami Aiyar.

Maddu Yerrayya	.. Appellant*
v.	(*Defendant*)
Yadulla Kangali Naidu & another	.. Respondents
	(*Plaintiffs*).

Yerrayya v. Kangali Naidu.

Landlord and Tenant—Ejectment of occupancy ryot—Onus.

There is no presumption in favour of an inamdar's title to eject an occupancy ryot in a Zamindari, and the plaintiff, whoever it be, whether the inam be within a Zamindari or outside it, should make out his title to eject the occupancy ryot.

Second appeal from the decree of the District Court of Ganjam in A. S. No. 76 of 1907 presented against the decree of the District Munsif of Somepeta in O. S. No. 712 of 1906.

Suit in ejectment by an Agraharamdar against tenants; lower Courts having decreed the suit, the defendants appeal.

V. Ramesam for appellant.

K. Narayana Row for respondent.

V. Ramesam for appellant:—The grant to the inamdar was more than a century ago. The grant was of an inam by the Zamindar. The lower Courts are wrong in placing the burden

*S. A. 375 of 1908. 19th February 1910.

Yerrayya v. Kangali Naidu.

on the defendants of making out an occupancy right. I submit the onus is on the plaintiffs. The lower Courts have relied on *Achayya* v. *Hanumantrayudu* [1]. This case has been explained in *Cheekati Zemindar* v. *Ramasooroo Dhore* [2]. Plaintiff suing in ejectment must make out his title to eject— *Venkatacharlu* v. *Kandappa*[3]. The village is an inam village. It was enfranchised in 1862. Therefore it cannot be a subsequent inam. The Inam Commissioner could not have enfranchised subsequent inams. Enfranchisement is possible only of prior inams. The inam is within the ambit of the zemindary. As regards occupancy rights of tenants such an inam cannot be worse than an inam outside it, and as regards an ordinary inam, *i.e.*, one not within a zemindary, see the case in *Venkatanarasimha* v *Dandamudi Kottayya.*[4] Some of the observations show that tenants have occupancy rights therein. The zemindar himself had probably only the melwaram right and he could not have granted the kudivaram to the inamdars, *Mayandi* v. *Chokkalinga*[5] is a case of ryotwari lands. *Rungasami* v. *Gnana Sambandan Pandara Sannadi*[6] also is a case of ryotwari land. The Judge is wrong in applying these cases to the present case.

My second point is this. There has been no notice to quit given, and there has been no denial of title. For this reason also the suit must fail.

Narayana Rao:—My submission is that under the circumstances of the present case the onus was rightly placed on the defendants. There is nothing to show that the inam is within the zemindary.

The Court delivered the following

JUDGMENT :—We are unable to uphold the decision of the District Judge. The plaintiffs are inamdars. They sue to eject the defendant, who and whose predecessors have been in possession for about fifty years. The plaintiffs have given no evidence of a right to eject the defendant which the Judge is inclined to accept. If the plaintiffs' inam were in a zemindari they could not be in a better position as regards the right to

1. (1891) I. L. R. 14 M. 269.
2. (1899) I. L. R. 23 M. 318 at 321.
3. (1891) I. L. R. 15 M. 95
4. (1897) I. L. R. 20 M. 299.
5. (1898) I. L. R. 22 M. 264.
6. (1903) I. L. R. 27 M. 291.

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eject the defendant than the zemindar who created the inam. If the inam was situated outside a zemindari and was granted by Government there would be no presumption in their favour that they were entitled to eject. The decision in *Achayya* v. *Hanumantrayudu*[1] has been explained as based on the particular facts of that case in *Cheekati Zamindar* v. *Ramasooroo Dhore*[2]. As the plaintiffs have failed to prove a right to eject the defendant we must reverse the District Judge's decree and restore that of the Munsif with costs here and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

The Secretary of State for India in Council, represented by the Collector of Tinnevelly. Appellant* (*Defendant*)

v.

Swami Navatheeswarar, through the trustee T. S. Chellam Pillai .. Respondent (*Plaintiff*).

Secretary of State for India v. Chellam Pillai.

Madras Act VII of 1865, *S.* 1—"*Used*"—*Liability for assessment—Essentials—Jurisdiction of Civil Courts—Collector's authority.*

In order to make a person liable for payment of water cess under S. 1 of Madras Act VII of 1865, the essential requisite is that the water used should be water from a Government source irrespective of the ownership of the land through which it passes; and it is not necessary for the creation of the liability that the person using it should have the option to refuse it. Nor is it necessary that the whole of the water used should be from a Government source. All that the section requires is (1) that water from a Government source should irrigate the land in question and (2) in the opinion of the Collector "the irrigation should be beneficial to and sufficient for the requirements of the crop." That other waters also have been used is no ground for getting rid of the liability.

The question as to the beneficial character of the water taken from the Government source and of its sufficiency are not for the Civil Court but for the Collector subject to the control of the Board of Revenue and of the Government, and when the Collector imposes the assessment by the orders of the Revenue higher authorities, the assessment is liable to be paid.

[*Secretary of State for India in Council* v. *Perumall Pillai*;[3] *Maria Mudali* v. *The Secretary of State for India in Council*[4] distinguished.]

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* S. A. No. 1019 of 1907. 24th February 1910.

1. (1891) I. L. R. 14 M. 269.
2. (1899) I. L. R. 23 M. 381 at 321.
3. (1900) I.L.R. 24 M. 279.
4. (1904) 14 M. L. J. 350.

Second appeal from the decree of the Subordinate Judge's Court of Tinnevelly in A. S. No. 136 of 1905, presented against the decree of the Court of the District Munsiff of Srivaikuntam in O. S. No. 334 of 1904.

Secretary of State for India v. Chellam Pillai.

Suit for refund of Rs. 7-14-0 which was collected from plaintiff by the Government as water-cess for the Fasli year 1312 (1902-1903) for having used water alleged to belong to the Government for irrigating two acres of punja lands for wet crop thereon in that Fasli. The water in question came from a Tharuvai which lay partly in plaintiff's Inam village, and partly in the Government Ayan village Sattavinallur. Higher up the two villages, there is the Government village called Mudalore which contains an irrigation tank by the name of Kundoor Urani. That tank is supplied with water by a canal opened from the Karamaganar and the surplus water of the tank flows into Tharuvai aforesaid through an Odai called Mudalore Odai. The Tharuvai is not an irrigation work and the water therein is simply allowed to stagnate without being used for any irrigation purposes either by the Government ryots or by the ryots of the plaintiff. During the rainy season the drainage water flowing through the Mudalore Odai into the Tharuvai considerably increases the volume of water in it, and it was in evidence that by the rise of the water in the Tharuvai during the monsoons of the Fasli 1312, plaintiff's lands were inundated, that he was therefore unable to raise Punja or dry crops thereon as usual and that he then collected the water which spread on his lands on a portion thereof and made it a reservoir for the irrigation of the two acres in question for raising wet crops upon them and used that water for the crop raised by him. On the above facts the Munsiff found that the water in the Inam portion was not Government water, the portion of the Tharuvai and the water collected in it being the property of the Inamdar, and that the Government was accordingly not entitled to levy water cess and this judgment was upheld on appeal by the Sub-Judge. Hence the appeal by the Secretary of State for India in Council.

The Government Pleader (C. F. Napier) for appellant.

T. V. Seshagiri Aiyar for respondent.

Secretary of State for India v. Chellam Pillai.

The Court delivered the following

JUDGMENT:—The dispute in this case relates to the right of Government to levy water cess on two acres of Inam land cultivated with the aid of water drawn from an alleged Government source. The plaintiff is the owner of an Inam village and the lands which have been assessed with the water cess have been classed as dry. The dry assessment constituted the Inam. Two-fifths of a sheet of water known as Tharuvai was included in the Inam. It is found by the Subordinate Judge on appeal that water from a Government source flows through the Mudalore Odai into the part of the Tharuvai which belongs to Government and thence onwards into the deeper part belonging to the plaintiff. The Tharuvai receives its supply of water generally from direct rainfall, but in certain seasons and in certain years the Odai water makes the Tharuvai overflow and submerge some of the dry lands of the Inamdar. It is found that in Fasli 1312, the plaintiff was compelled to make the best of the situation by raising wet crops on two acres of his dry land, which had become unfit for dry crops owing to the inundation, with the help of the water which he enclosed in his adjoining land out of the flood water. The Subordinate Judge decreed the plaintiff's claim for refund of the assessment, holding that the water which came through the plaintiff's portion of the Tharuvai was his water and he was not liable to be charged therefor.

It is argued by the Government Pleader on behalf of the Secretary of State for India that the plaintiff is liable under Act VII of 1865, because the water comes from a Government source and the plaintiff's lands have been irrigated thereby and that it is immaterial that after leaving the Government source, it has passed through the plaintiff's portion of the Tharuvai. There is no question in the case as regards property in the water. Madras Act VII of 1865 is not based upon any theory of the ownership of the bed of a tank or water course being the foundation of a right to use the water free of charge. Section 1 of the Act specifies the conditions under which the cess is liable to be imposed. The water must come from a river, stream, channel, tank or work belonging to or constructed by Government. This condition is satisfied in this case—because three-fifths of the Tharuvai, the Mudalore Odai, the Oorani beyond, and the river

which supplies it are all admittedly the property of the Government. The next condition is that the water from that source should, from or through the adjoining land, irrigate a land under cultivation or flow into a reservoir and be thereafter used for irrigating any land under cultivation. In this case water from the Government source flows through two-fifths of the Tharuvai, which is the adjoining land. It does not matter to whom that land belongs. By flowing through plaintiff's two-fifths of the Tharuvai it does not cease to be water from a Government source. That water has admittedly irrigated the plaintiff's two acres of dry Inam land. It was first of all contended by Mr. Seshagiri Iyer for the respondent that the water became the Inamdar's by flowing through his portion of the Tharuvai. We need only answer this by saying that it has not ceased to be water from a Government source. He next relied upon the decisions in *Venkatappayya* v. *The Collector of Kristna*[1] and *Krishnayya* v. *Secretary of State for India*[2] which held that there could be no use for irrigation within the meaning of the section unless it was voluntary or in other words the person said to make use of it had an option to refuse it. It may be assumed that the same interpretation must be placed upon the phrase " used for purposes of irrigation" in clause (*a*) of the section after the amendment as was done before it. But Mr. Seshagiri Aiyar's arguments overlook the fact that the old section of Act VII of 1865 was amended in order to get rid of the effect of those decisions and that clause (*b*) creates a liability to assessment where the water from the Government source irrigates any land under cultivation and not merely " is used for purposes of irrigation " with or without the will of the person whose land benefits by the water, the water may irrigate the land. We must, therefore, overrule the argument based upon the employment of the word 'use' in the section. It was lastly urged that in the portion of the Tharuvai belonging to the plaintiff there was the rain water which had not come from a Government source, and although the flood water from the Government source poured into the Tharuvai, it could not be said that the water from the Government source was used by the plaintiff for cultivation, while it was not shown that the rain water in the Tharuvai was not sufficient for the cultivation which was carried on.

1. (1887) I. L. R. 12 M. 407. 2. (1895) I. L. R. 19 M. 24.

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The overflowing of the Tharuvai in this case was the result of the flood and the flood was from the Government source. Although the flood water had got mixed with the rain water in the Tharuvai itself, it could not be contended that no portion of the water which irrigated the land consisted of the water from the Government source. We cannot admit that there is any force in the argument that in order to render the plaintiff's land liable to assessment it is necessary that the whole of the water used should be from a Government source. All that the section requires is that water from a Government source should irrigate the land in question, and in the opinion of the Collector "the irrigation should be beneficial to and sufficent for the requirements of the crop." That other water has also been used is no ground for getting rid of the liability. The question as to the beneficial character of the water taken from the Government source and of its sufficency are not for the Civil Court but for the Collector subject to the control of the Board of Revenue and of the Government. The Collector in this case having imposed the assessment and he not having been overruled by the higher revenue authorities, we think the plaintiff is clearly liable to pay the assessment

A question was raised in the course of the argument as to the meaning of the word 'irrigation'—see KINNEY on *Irrigation*, page 2—and whether in this case the plaintiff can be said to have irrigated his land with water from a Government source. Upon the facts found, however, it is clear that the water has irrigated the plaintiff's lands, in whatever sense that term is to be understood.

The Subordinate Judge has referred to the decision in *Secretary of State for India in Council* v. *Permal Piillai*[1] and *Maria Susai Mudali* v. *The Secretary of State for India in Council.*[2] They have obviously no application to the present case. There the proprietors were, by an engagement with the Government, entitled to the water free of separate charge. The estates were permanently settled and the proprietors were entitled to make what use they pleased of the lands included in the settlemenet. The right to the water having existed at the date of the grant and the permanent seettlement having been made so as to pass it

1. (1900) I. L. R. 24 M. 279. 2. (1904) 14 M.L.J. 350.

the eye of the law all the rights which then existed, they were not liable to be charged with any water cess in respect of any cultivation which they carried on with the aid of water to which they were entitled. Those decisions, therefore, do not touch the decisions of the present case.

Secretary of State for India, v Chellam Pillai

We must reverse the decree of the Courts below and dismiss the suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Chinnasawmi Chettiar and others .. Appellants*
v. (*Plaintiffs*)
Collector of Salem and District Board of Salem .. Respondents (*Defendants*).

Madras Acts—Local Board Act—Right of suit for illegal levy by Collector—Parties—District Board not a proper party.

Chinnasawmi v. Collector of Salem.

A suit for damages against the Collector in respect of an illegal levy of land cess by him is sustainable; and no action lies against the District Board in respect of the illegal levy by the Collector though the money levied was eventually handed over to the District Board.

Second appeal from the decree of the District Court of Salem in A. S. No. 202 of 1907, presented against the decree of the Court of the District Munsif of Tirupattur in O. S. No. 456 of 1906.

Plaintiff brought this suit for refund of land cess alleged to have been illegally collected from him by the 1st defendant, the Collector of Salem, and handed over by him to the 2nd defendant, the District Board of Salem. The suit was dismissed on the ground that the Collector acted as the agent of the Secretary of State and that the Secretary of State alone is liable to be sued.

T. Subrahmania Aiyar for appellant.

The Government Pleader (*C. F. Napier*) for 1st defendant, Collector-respondent.

T. Subrahmania Aiyar:—The allegation in the case is that the Collector has illegally levied the land cess ; whether in collecting he is the agent of another or not is immaterial. So far as

*S. A. 1452 of 1906, 18th March, 1910.

Chinnasawmi v. Collector of Salem.

his liability is concerned every tort-feasor is liable for his tort; whether his master also is liable or not is another question—POLLOCK on *Torts*, 6th Edn. p, 72. S. 76 of the Local Boards Act is the section which authorises the Collector to collect. As under Ss. 148 and 149, which empower to hand over the money to the District Board, he has handed it over him to the District Board, the District Board also is liable. [*Court.—Harischandra Devu* v. *President, District Board of Ganjam*[1] is against you as regards the liability of the Board.]

The Government Pleader.—The Collector is only an officer of the Secretary of State and does his duty only as such, and so his acts ought to be deemed to be the acts of the Secretary of State. He cannot be personally liable for an act which he did as an officer in pursuance of a statutory duty. Such an act cannot be a tort in law. [*Aiyar* J.—The allegation is that you exceeded your statutory duty.] No one has ever heard of suits against Collectors personally. All have been only against the Secretary of State.. [*Aiyar* J. :—There are numerous such cases.]

The Court delivered the following

JUDGMENT:—We do not think the District Board is liable. The Collector was the person who levied the cess under S. 76 of the Local Boards Act. Following the decision in *Harischandra Devu* v. *President District Board of Ganjam*[1], we must hold that the suit was rightly dismissed as against the District Board.

As regards the suit against the Collector we see no reason to think it is badly framed. The basis of the action is that the Collector acted in excess of his statutory authority. The liability is one which sounds in tort. It is true the plaintiff does not describe the relief claimed as damages for a tort, but as refund of money levied. The money levied is only the measure of the damages sustained. Except in cases of contractual agency there is no question of the liability of the doer of the act charged. It may or may not be according to circumstances that somebody else is liable also as master or principal. We must, therefore, reverse the decrees of the Courts below as regards the 1st defendant and remand the suit to the District

1. (1900) I.L.R. 24 M. 114.

Munsif to be disposed of according to law. The costs as between the plaintiff and the 1st defendant hitherto incurred will be provided for in the revised decree. Chinnasawmi v. Collector of Salem.

We must dismiss the second appeal against the 2nd defendant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

K. S. Veera Raghavalu . Petitioner*

Madras City Municipal Act, Ss. 125 (1), 177—*Prosecution—Defence of non-exercise of profession.* In re Veera Raghavalu.

In a prosecution before the Magistrate under S. 125 (1) of the Madras Municipal Act, the defence of non-exercise of the profession is not open to the accused. The provision as to finality in S. 177 must be given its full effect; and no question can then be allowed to be raised by way of defence to a prosecution or to a distress or to a civil suit.

T. S. Rajagopala Aiyar for petitioner.

P. Duraisami Aiyangar for complainant.

Petition, under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the 3rd Presidency Magistrate, Georgetown, in C. C. No. 2865 of 1910 sentencing the accused to pay a fine of Rs. 22-8-0.

The facts are sufficiently stated in the judgments.

T. S. Rajagopala Aiyar—contended that a prosecution for non-payment of profession tax can stand only if it is proved that the accused was exercising a calling or profession at the relevant time. He referred to S. 125 (1), S. 177 and S. 420 of the Madras Municipal Act and S. 106 of the District Municipalities Act.

P. Duraisami Aiyangar—contended that the Legislature having provided a special tribunal in the President to determine the question as to residence, &c., that fact cannot be canvassed in the Magistrate's Court. He strongly relied upon the difference between the present section and the corresponding section in the old City Municipal Act.

T. S. Rajagopala Aiyar replied.

The Court made the following

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* Cr. Rev. Case No. 175 of 1910. 26th August 1910.
Cr. Rev. Petn. No. 137 of 1910.

In re Veera Raghavalu.

Wallis J.

ORDERS :—*Wallis* J.—In this case the 3rd Presidency Magistrate has convicted the petitioner under S. 125 (1) of the Madras City Municipal Act, 1904, for failure to pay profession tax for the 1st half-year of the financial year 1909-10. It is common ground that the petitioner's name appeared in the classification drawn up by the President of the Corporation under S. 121, and it was shown that a notice had been served on him under S. 125, but he alleged that he had not exercised any profession within the city for sixty days during the current half-year, and the Presidency Magistrate convicted him, merely observing that he had no witnesses; but this appears to have reference to the failure of the petitioner to produce witnesses as to the service of notice, and the contention raised in behalf of the Corporation was that the fact of notice to pay the tax for the half-year having been served on the petitioner was conclusive of his liability to pay in view of his failure to apply for revision within fifteen days of the notice. This part of Act III of 1904 re-enacts, without much modification, the provisions of the previous Act I of 1884, and it will be of assistance to compare the provisions of the two Acts and to see what was the state of the law under the old Act and if it has been altered by the present Act. Under S. 101 of the old Act as under S. 118 of the present Act, the President is required to keep lists of persons liable to pay this among other taxes. Secs. 103 and 120 respectively make persons exercising a profession or holding an appointment in the city liable to pay the tax. S. 104 of the Act of 1884 empowers the President to determine in which of the scheduled classes "any such person," that is to say, any person exercising a profession or holding an office in the city, is to be placed, and to revise such classification from time to time, and also empowers any person dissatisfied with such classification to appeal therefrom. S. 121 of the present Act is to the same effect, but "any person" is substituted for "any such person." Section 105 of the old, corresponding to S. 126 of the new Act, provides that the tax for each half-year shall become payable after the profession has been exercised or the appointment held for sixty days in the half-year. S. 124 of the present Act, which is new, provides that no person shall be liable to the tax in respect of any half-year in which he has exercised a profession or held an appointment for less than sixty

days within the city. S. 106 which corresponds to S. 125—the section now in question—is as follows:—"If in a half-year any person exercises any such *** profession *** or holds any such *** appointment for sixty days without paying the sum due in respect of such half-year, the President may, so soon as he is informed thereof, cause to be served on such person a notice that if within fifteen days from the date of such service, such payment be not made such person will be prosecuted for such default. If such person omits to make such payment together with the costs of service, the President may, at the expiration of the said fifteen days, cause the person so in default to be prosecuted before a Magistrate." S. 125 of the present Act is virtually to the same effect except that it omits the words "so soon as he is informed thereof." Then S. 107 of the old Act provides that: "If the Magistrate finds that such person is liable and that such default has been made and that such notice has been duly served, such person shall be liable to a fine not exceeding twice the amount of the tax and shall also pay the tax, the costs of service of notice, and such other costs as may be provided by the Magistrate." In accordance with the scheme of the new Act, the penalty for this and other breaches is provided for by S. 420, read with Schedule XVI, which imposes a penalty not exceeding twice the amount of the tax.

Ss. 190 to 196 of the old Act correspond generally to Ss. 172 to 177 of the new Act and deal with complaints against taxes or classification providing for the finality of the decisions given on such complaints and of the original demand in the absence of such complaint. So far as the profession tax is concerned the language of S. 172 of the new Act appears to me to be, if any thing, larger than of S. 190 of the old Act, because S. 190, so far as it relates to profession tax, dealt only with complaints or applications for revision preferred under S. 104, which deals with revision of classification, whereas S. 172 of the new Act deals generally with "all complaints against, and all applications for revision of classification in respect of, any tax or toll leviable under Part IV." I have inserted the commas, but the grammatical construction appears to me equally plain without them. Then as regards the sections as to finality, the provision in S. 196 against suits to recover back taxes levied under

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the Act, provided the provisions of the Act had been substantially complied with, is omitted in S. 177. Further in S. 191, which corresponds to S. 208 of the old Act and saves irregularities due to defect of form, the words "provided the directions of the Act be in substance and effect complied with" are omitted. In the face of these last-mentioned alterations, the decisions under the District Municipalities Act that persons not liable to the tax can sue to recover it back—*The Municipal Council, Cocanada* v. *The Standard Life Assurance Company* [1] and the cases therein cited—have become clearly inapplicable under the Act as they proceed upon language which is not used in the present Act. A question as to the extent of the right of complaint given under the old Act was raised in *Davis* v. *President of the Madras Municipality*,[2] where it was held against the contention put forward by the Municipality that a partner in a firm carrying on business in Madras who had been wrongly classified as personally liable as distinct from his firm was entitled to apply for revison under S. 190 read with S. 104, and that his right to apply for revision was not limited to complaints as to the class in which he had been placed. Then if he had a right of complaint and failed to exercise it, the provisions of S. 190 would appear to preclude him from questioning the original demand. The question whether a person who had not applied for a revision could insist on the question of his liability being gone into in a prosecution under S. 107 did not arise and *Shephard* J. did not deal with it, but *Muthusawmi Aiyar* J., at the bottom of p. 144, observed that "Section 107 makes non-liability to be taxed available also as a matter of defence in case of prosecution." It is, however, not apparent how, if the provisions as to finality in S. 196 applied to proceedings under S.107, the defence of non-liability was open; and if they did not apply, why the prosecution should be relieved of proving liability as part of its case. That the provisions of S. 196 did apply seems to follow from the decision of the learned Judges themselves, for if a person who had a notice served on him under S. 106 had a right of complaint under S. 190 on the ground of non-liability to pay, is there any reason for refusing, in proceedings under S. 107 to give effect to the provisions of S. 196 that when no com-

1. (1900) I. L. R. 24 M. 205. 2. (1890) I. L. R. 14 M. 140.

plaint has been made the assessment, revision or demand of the tax shall be final, that is to say, not open to question? I have not been able to find any satisfactory reason for so holding, and it appears to me that in a prosecution under S. 107 of the old Act in order to procure a conviction it was enough to prove classification, notice under S. 106, failure to complain within 15 days of such notice, the time limited by S 191 (*a*) and failure to pay pursuant to the notice. To say that the provisions of S.196 as to finality apply to proceedings to recover the tax by distraint or suit, but not to proceedings under S. 107, which is perhaps the most ordinary method of enforcing payment, appears to me to be restricting unduly the provisions of S. 196, nor do I I see any sound reason for the distinction.

Now if failure to complain of classification within the time limited under Ss. 104 and 190 was conclusive under the old Act, I can find no reason in any of the changes in the recent Act which have been set out above why failure to complain under Ss. 121 and 172 of the present Act should not have the same effect. On the contrary the language of S. 172 of the new Act, as already pointed out is, if any thing, wider than that of S. 190 of the old Act, so that the scope of S. 177 is enlarged in this way also, as well as by the omission of the second part of S. 196 which suggested limitations on the finality conferred by that section. In my view the decision of the Magistrate was right and the petition must be dismissed.

Krishnaswami Aiyar J:—The accused in this case has been convicted under Ss. 125 and 420 of Madras Act III of 1904. He was called upon to pay profession tax by notice under S. 125, and having failed to pay within the time limited by that section, he was prosecuted by the President of the Municipal Corporation and convicted by the 3rd Presidency Magistrate, Georgetown. The accused impugns the legality of the Magistrate's order on the ground that under S.125 no offence could be committed unless he exercised a profession, art, trade or calling, and that there was no inquiry or determination by the Magistrate as to the exercise of a profession &c., &c., by the accused. The Magistrate's order simply says that the accused had no witnesses. It is, however, admitted before us that the absence of witnesses had reference only to the plea that the notice was not duly served, but not to the question whether the accused exercised the profession. Was the Magistrate right in declining to inquire into the plea of non-exercise of the profession? The question

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thus raised is one of some difficulty, but I have come to the conclusion that he was right. S. 172 of Madras Act III of 1904 provides "that all complaints against and all applications for revision of classification in respect of any tax or toll leviable under Part IV shall be heard and decided by the President and two Commissioners." S. 175 provides an appeal against the order of the President and two Commissioners to Magistrates. S. 176 authorises a reference by the Magistrates to the High Court. S. 177 declares the finality of the decision of the respective authorities in the following terms:—

"The assessment, revision or demand of any tax or toll, when no complaint, application or objection is made as hereinbefore provided, and the adjudication of an appeal by the Magistrates shall be final." It will be noticed that the declaration of finality is not merely with reference to the decision of Magistrates or of the President and Commissioners but, in case no complaint or objection is made with reference to the original assessment. Whatever question, therefore, can be raised by way of complaint or application for revision under S. 172 must be finally set at rest by virtue of the last clause of S. 177 and cannot be availed of by way of defence to a distress under S. 180 or a suit under Clause (1) of S. 188 or a prosecution under S. 125 or the 2nd Clause of S. 188. We have then to determine what are the matters that can be dealt with under S. 172. The 1st clause of the section which I have above quoted is somewhat different from the 1st clause of S. 190 of the old Act I of 1884 which ran as follows:—

"All complaints against, or applications for, revision of any classification or tax preferred under Sections 104, 115, 181 and 188, and all complaints against, and objections to any valuation or measurement and assessment, preferred under Sections 130 and 131, and all complaints against any other tax or toll assessed or demanded by the Commissioners shall be heard and disposed of, etc." Now it will be seen at a glance that the 1st clause of S. 172 of the present Act is more compendious. It will also be noticed that instead of specifying complaints or applications under particular sections of the Act, all complaints and applications relating to any tax or toll leviable under Part IV are stated to be within the cognizance of the President and two Commissioners. Although punctuation is not a safe guide in the interpretation of a legislative enactment (See MAXWELL, pp. 61 and 62) we may note that S. 190 of the old Act was largely punctuated

so as to furnish a clue to the interpretation of that section. The 1st clause of S. 172, on the other hand, is not punctuated at all. The difficulty arises as to how it should be read. But I think the meaning is tolerably clear that all complaints against any tax or toll leviable under Part IV and all applications for revision of classification in respect of any such tax or toll are cognizable by the President and two Commissioners. It seems to me that the section ought not to be read so as to limit the complaints and the applications for revision to the question of classification. Even apart from the history of that section, namely, that it is in substance a reproduction of S. 190 of Act I of 1884, such an interpretation is inadmissible on the ground that there is no question of classification under the Act as regards tolls, or the tax on carts, or the tax on vehicles, dealt with in Part IV of the Act, and yet complaints in respect of them must certainly have been intended to fall within the scope of S. 172 as they certainly fell under the express language of S. 194 of the old Act. There are various taxes or tolls leviable under several sections in Part IV of the Act, such as Sections 120, 129, 145, 148, 150, 158, 164. It is only in the case of certain of the taxes or tolls that revision is expressly provided. For example, S. 121 provides for revision in the case of the profession tax as regards classsification; S. 139 provides for revision of valuation; S. 155 speaks of the vehicle tax being the subject of an appeal as hereinafter provided. There is no other provision as regards the right to complain against any tax or to apply for its revision. Yet it must be conceded that if the President declines to remove a person's name from the assessment book under Clause (*c*) of S. 136, it ought to be competent to him to apply to the President and Commissioners for the removal of his name on the ground that he is not the owner liable to the tax on the buildings. Again, if the President declines to remit the tax when a building has been vacant for "thirty consecutive days or more" in proportion to the number of days of vacancy (*vide* S. 142) the owner should not be refused the liberty of proving to the President and two Commissioners that the house was vacant for a sufficient number of days to entitle him to remission. If the President refuses to grant exemptions under Section 126, or S 151, or S. 150, or S. 158, it cannot be supposed that complaints to the President and two Commissioners are excluded. Even the question of non-liability on account of the non-exercise of the profession for sixty days or more under S. 124 can be determined after notice under S. 125 by the President and two Commissioners under S 172.

In re 'eeraragha-valu. — .rishnasami Aiyar J.

For S. 174, Clause (*a*) provides that within fifteen days after notice under S. 125 an application for revision may be made under S. 172. I conceive that by the mention of "all complaints against any tax or toll leviable under Part IV" the competency of the aggrieved party to make a complaint against any tax or toll and to apply for revision of classification in respect of it is distinctly recognised. If I am right in this view, it follows that the provision as to finality in S. 177 must be given its full effect and no question can then be allowed to be raised by way of defence to a prosecution or to distress or to a civil suit. I am, therefore, inclined to hold that as the petitioner did not complain against the assessment as provided by the Act, it has become final. If S. 172 was limited to the bare question of classification, as Clause 2 of S. 121 appears to be (cf. *Wood* v. *Corporation of the Town of Calcutta*[1]) the clause as to finality in S. 177 might be restricted to the question of classification. But upon the interpretation we placed on S. 172 it is impossible to hold that the defence of non-exercise of the profession is open to the petitioner in a prosecution before the Magistrate. Nor is there any hardship in the adoption of such a view. For the Act has provided in substitution the larger remedy of appeal to two Magistrates with the further advantage of a reference to the High Court. The observations of Mr. Justice *Muthusawmi Aiyar* in *Davis* v. *President of the Madras Municipal Commission*[2] that the defence of non-exercise of the profession is open to the accused in a prosecution under S. 107 of the old Act I of 1884 for non-payment of the profession tax, do not appear to be in accord with his general reasoning as regards the competency of the Magistrates in appeal from the President and two Commissioners to determine the question of liability to the profession tax as well as of the proper class under which a person is liable. The decision in *Municipal Council, Cocanada* v. *The Standard Life Assurance Company*[3] is based upon the language of Ss. 101 and 262 of the District Municipalities Act IV of 1882, which differs materially from that of the corresponding provisions of Act III of 1904. I think the conviction in this case is right and would, therefore, decline to interfere.

1. (1881) I. R. 7 C. 322. 2. (1890) I. L. R. 14 M. 140 at p. 144.
3. (1900) I. L. R. 24 M. 205.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Kamalathammal .. .. .. Appellant*
v. (*Plaintiff*)
Krishna Pillai & another .. .. Respondents
(*Defendants*).

Kamalathammal v. Krishna Pillai

Limitation Act, Art. 124, applicability of—Adverse possession of profits alone without the office—Plaintiff entitled to beneficial enjoyment of property—Starting point.

Art. 124 applies only when the suit is one against the holder of the office.

Possession of the lands alone does not constitute "possession of the office" within the meaning of Art. 124.

Where the plaintiff is entitled to the beneficial enjoyment of the lands attached to a trust, time begins to run for a suit to recover the property only from the time when his right to the beneficial enjoyment thereof accrues. The decision in *Gnana Sambanda Pandaram* v. *Velu Pandaram*[1], has not over-ruled that in *Mahomed* v. *Ganapati*[2] in this respect.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 146 of 1907 presented against the decree of the Court of the District Munsif of Shiyali in O. S. No. 58 of 1906.

The suit was brought by the plaintiff, as the widow of the person last entitled, to recover a *Sthanika* office and the lands held by the family in virtue of that office. The Mirasi of the lands stood in the name of the deity, but the lands themselves were held by the family of Sthanikas and had oftentimes been divided by them in proportion to their rights in the Sthanika office. There were no trustees for the temple, and, so far as appeared, the Sthanikas themselves who received the income of the lands in their respective possession were in the habit of performing pooja at their cost during their respective turns.

The plaintiff's husband alienated the lands in his possession and his turn of office to the 1st defendant in 1893, and died in 1897. The present suit was brought more than 12 years after the date of alienation, but at the date of the suit the 1st defendant, though in possession of the lands, was not performing the duties of the office. Among other pleas the 1st defendant relied upon limitation. The 2nd defendant who was discharging

* S. A. 780 of 1908. 16th March 1910.

1. (1900) 23 M. 271. 2. (1890) 13 M. 277.

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the duties appeared and expressed his willingness to put the plaintiff in possession of the office.

The District Munsif held that the deed of transfer in favour of the 1st defendant was not given effect to during the lifetime of the plaintiff's husband and that, therefore, the suit was in time. The District Judge held that effect was given to the transfer from the date of the document, and more than 12 years having elapsed since that date he held that the plaintiff's suit was barred. Reliance was placed on behalf of the plaintiff on *Mahomed* v. *Ganapathi*,[1] but the District Judge held that the case must be taken to have been overruled by the decision of the Judicial Committee in *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram*[2]. The plaintiff appealed.

S. Varada Chari (*for T. R. Venkatrama Sastri*) for appellant.

T. R. Ramachandra Aiyar for respondents.

S. Varada Chariar :—The District Judge was wrong in holding that the suit was barred. He finds possession of the lands with the 1st defendant since 1893, but unless the 1st defendant has acquired the office also by adverse possession plaintiff's right to recover the lands in virtue of the office will not be barred. Assuming that the plaintiff's husband ceased to perform the duties of the office from the date of the transfer, the 1st defendant would not acquire it himself unless he has been in possession of the office for 12 years. It is not enough that plaintiff has been out of possession. See *Raghunatha Chariar* v. *Ramanuja Chariar* [3] ; see also S.A. 1540 of 1904 unreported. The possession of the lands alone will not constitute possession of the office within the meaning of Art. 124 The 2nd defendant who is performing the duties of the office admits the plaintiff's right and is willing to put her in possession of the office.

If, therefore, the plaintiff's right to the office still subsists, she is entitled to recover possession of the lands attached thereto. *Velu Pandaram's* case [2] applies to a claim to recover the office. *Mahomed* v. *Ganapathi* [1] has not been overruled by *Velu Pandaram's* case and is therefore still good law. This is shown by the recent decision of the Privy Council in *Abhiram Goswami* v. *Shyama Charan Nandi*. [6] The Calcutta High Court referred

1. (1890) I. L. R. 13 M. 277.
2. (1899) I. L. R. 23 M. 271.
3. (1908) 19 M.L.J.R. 257.
4. (1909) I.L.R. 36 C. 1003.

to Art. 144 and to *Velu Pandaram's* case[1] and dismissed the plaintiff's suit (see *Shyama Charan Nandi* v. *Abhiram Goswami*[2]). The Privy Council reversed the decision and gave a decree in favour of the plaintiff. In the argument before the Judicial Committee also, reliance was placed by the defendants on Art. 144. Reference was made to *Velu Pandaram's* case[1] as also to *Mahomed* v. *Ganapathi*[3]. Their Lordships held that if the alienation was good for the lifetime of the alienor, limitation commenced to run as against the successor not from the date of alienation but from the date of the alienor's death. There is no question of successive life estates here, for the property is vested in the deity; not so in the case of the office. See also *Chidambara* v. *Muniammal*[4] where the learned Judges hold that *Mahomed* v. *Ganapathi*[3] was not inconsistent with the view there taken following *Jamal Saheb* v. *Murugaya*[5]. See also *Satianama* v. *Saravana*.[6]

T. R. Ramachendra Aiyar:—The District Judge must be taken to have found as a question of fact that the 1st defendant has been in possession of the office since 1893. Where there are emoluments attached to the office, receipt of the emoluments constitutes adverse possession of the office—see explanation to Col. 3 of Art. 124—and the 1st defendant having been in possession of the lands since 1893, plaintiff's right to the office has been extinguished. *Velu Pandaram's*[1] case does apply to the present case. The deed of transfer recites that the property is trust property and the alienation was therefore bad even as against the alienor. *Abhiram Goswami's* case[7] does not therefore apply.

S. Varada Chariar in reply:—The question of property being trust property was not raised in the Courts below. At any rate the Sthanikas have *some* beneficial interest in the property and in such a case the alienor cannot himself question the alienation—see MITRA'S *Limitation*, 5th Ed., p. 207, Footnote. The alinee's possession was not, therefore, *ab initio* adverse. Art. 124 can apply only when the suit is for the recovery of the office. The 3rd column must be read with the 1st column. A trespasser in possession of the lands attached to an office cannot be considered to be prescribing for the office.

1. (1800) I. L. R. 23 M. 271.
2. (1906) I. L. R. 33 cal. 511.
3. (1890) I. L. R. 13 M. 277.
4. (1898) I. L. R. 22 M. 439.
5. (1885) I. L. R. 10 B. 34.
6. (1895) I. L. R. 18 M. 266.
7. (1909) I. L. R. 36 C. 1003 (P.C).

Kamalath. ammal v. Krishna Pillai.

The Court delivered the following

JUDGMENT:—The suit is by the widow of an *archaka* to recover the office and the lands which appertained to the office from defendants Nos. 1 and 2. The office and the lands were alienated by the plaintiff's husband under Exhibit I in 1893 to the 1st defendant. It is found by the District Judge on appeal that the lands have been in the 1st defendant's possession for more than 12 years. As regards the office he says possession passed at the same time. He does not, however, find who held possession of the office since 1897.

The Munsif held that since 1897 the 2nd defendant performed the duties of the office. Mr. Ramachendra Iyer argues, appying Article 124, Schedule II, Indian Limitation Act, that as the 1st defendant enjoyed the emoluments he must be deemed to have held the office as well. This we are unable to agree to. Article 124 deals with a suit for possession of a hereditary office. That means the suit is against the holder of the office. The third column says that the time runs from the date when the defendant takes possession adversely. An explanation is attached to the clause in the third column that the office is possessed when the emoluments are received in cases where emoluments are attached. The explanation is not attached to the words in the first column. Nor does it say that mere receipt of the emoluments, without reference to any performance of the duties, will enable the recipient to claim possession of the office if the duties are being performed by another. At all events to apply the article the suit must be one against the holder of the office. To hold otherwise would mean when two different persons perform the duties of the office for the statutory period the latter acquires the right to the office, a conclusion which appears to us to be manifestly absurd, nor can the conclusion be avoided, when the emoluments are taken by several persons in severalty without any of them doing the duties, that they have all acquired a right to the office. We must then overrule the contention that the 1st defendant by possession of the lands alone has acquired a right to the office.

The next question is whether the 2nd defendant's possession since 1897 was as the deputy of the 1st. In that case the plaintiff's right to the office would be barred and, as a

consequence thereof, his right to the lands as well. As regards the lands the claim would not be barred if the plaintiff's family was entitled to the beneficial enjoyment thereof. See *Mahomed* v. *Ganapathi*[1]. This view has not been overruled by the Privy Council in *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram*[2] which was the case of a trust. We are unable to hold that *Abhiram Goswami* v. *Shyama Charan Nandi*[3], which was the case of a lease under which rent was being paid, affects the principle to be applied to the present case. But Mr. Ramachendra Aiyar says that the lands belonged to the temple and were only burdened with a charge for beneficial enjoyment in favour of the plaintiff's family. This does not appear to us to affect the right of the plaintiff to recover the property from the time her right to beneficial enjoyment accrues. But before we dispose of the case it is necessary to have a finding on the question as to who had possession of the office since 1897 and, in case it was the 2nd defendant, whether he was in possession on behalf of the 1st.

Kamalath-ammal v. Krishna Pillai

The finding should be returned within a fortnight after the recess on the evidence on record and seven days will be allowed for filing objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Sir Charles Arnold White, *Kt*, Chief Justice, and Mr. Justice Munro.

Ranee Annapurni Nachiar .. Appellant*

v.

Swaminatha Chettiar & others .. Respondents

Transfer of Property Act, S. 6 (d)—Right to future maintenance, Alienability—Contract Act, S 16—Undue influence—"Position to dominate"—Cases before amendment—Hard and unconscionable bargain—Advice—Relations.

Annapurni Nachiar v. Swaminatha Chettiar.

A right to future maintenance of a Hindu widow made payable by agreement or decree is alienable.

A right to future maintenance is not an interest in property restricted in its enjoyment to the owner personally within the meaning of Cl. (*d*) of S. 6, T. P.A.

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1. (1890) I.L.R. 13 M. 277.
2. (1900) I.L.R. 23 M. 271.
3. (1909) I.L.R. 36 C. 1003.

* A. 109 of 1908. 18th February, 1910.

Annapurni Nachiar v. Swaminatha Chettiar.

The word "relations" in S. 16 of the Contract Act means not only the personal relations but the circumstances in which the contract was entered into. The fact that the bargain was a hard one is no ground for relief; and urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate the will within the meaning of S. 16 of the Contract Act. The fact that the borrower had the advice of a Vakil while borrowing does not preclude the borrower from asking for relief or the Court from exercising the jurisdiction given by S. 19 A of the Contract Act.

Cases decided before the amendment can be looked into as throwing light on the question as to what circumstances will give rise to relations which place one party to a contract in a position to dominate the will of the other party.

Appeal from the decree of the Subordinate Judge of Tinnevelly in O S. No. 1 of 1907.

The facts appear sufficiently in the judgment.

The Advocate-General (P.S. Sivaswami Aiyar) and *S. Gopalasami Aiyangar* for appellant.

K. Srinivasa Aiyangar for respondent.

The Advocate General contended that the decree being a decree for maintenance was not alienable in any way. It is not attachable—S. 266, C. P. C. That this is not merely by reason of express enactment is clear by the fact that even before the enactment of S. 266 or analogous provision, it was held that the right of future maintenance was not attachable—*Bhyrub Chunder Ghose* v. *Nubo Chunder Gooha.*[1] That it is not alienable has been held in *Narbada Bai* v. *Mahadeo Narain*[2]; *Diwali* v. *Apaji Ganesh.*[3] See WEST & BUHLER, p. 449. See also S. 6, Transfer of Property Act.

Even supposing that the alienation is valid, the provisions of the contract are unconscionable and ought to be relieved against. The rate of interest is exorbitant, and in itself will do to stamp the agreement as unconscionable under S. 16, I.C.A. See POLLOCK and MULLA, *Contract Act*, p. 84 (2nd Edn.) The highly necessitous condition of the lady together with the fact that the plaintiff is a money-lender will at least do—*Kamini* v. *Kali Prosunno Ghose*;[4] *Chunni Kuar* v. *Rup Singh*[5] confirmed in appeal *sub nomine*; *Raja Mohkan Singh* v. *Rajah Rup Singh*[6]; also *Husain Baksh* v. *Rahmat Husain.*[7]

K. Srinivasa Aiyangar relied upon *Durgadut Singh* v. *Rameshwar Singh*[8] for the position that when the right to

1. (1866) 5 W.R. 111.
2. (1880) I.L.R 5B. 99 at 104.
3. (1886) I.L.R. 10 B 342.
4. (1885) I.L.R. 12 C. 225.
5. (1888) I.L.R 11 A. 57.
6. (1893) I.L.R. 15 352 A. 20 I.A. 127.
7. (1888) I.L.R. 11 A. 128.
8. (1909) I.L.R. 36 C. 943 (P.C.)

maintenance becomes defined in a decree or in a grant of property, such property and such decree are alienable though on special grounds of public policy they may not be attachable. The reason why they are not attachable is indicated for instance in *Muthuraman* v. *Ettappasami*[1] and *Haridas Acharjia Chowdhry* v. *Baroda Kishori Acharjia Chowdhry.*[2] The distinction between attachment and alienation is pointed out in the recent case of *Mangena* v. *Wright.*[3] The cases cited by the appellant are cases of attachment. On the question of undue influence, the mere fact that the debtor was in urgent need of money and borrowed from a money-lender between whom and herself there was no antecedent relationship is not sufficient to justify any inference of undue influence. There must be some equity arising from the position of the parties—*Ganesh* v. *Vishnu*[4] ; *Chatring Moalchand* v. *Whichurch*[5] ; *Sundar Koer* v. *Rai Shaon Kishen*[6] ; *Dhanipal Das* v. *Maneshwar Baksh Singh*[7]. That an antecedent relationship of dominating influence is necessary is clear from even *Chunni Kuar* v. *Rup Singh*[8]. See also *Maneshar Bakshi Singh* v. *Shadi Lal*[9]. That mere high interest will not do is laid down in *Satish Chunder* v. *Hemchander*[10] ; *Umesh Chandra* v. *Golap Lal*[11].

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The *Advocate General* in reply, submitted that the fact that a decree is passed cannot make any difference since the mischiefs aimed at in prohibiting transfers of such kind still exist and the other ground on which it cannot be transferred, *viz.*, that the right is personal, is none the less true of a decree that is passed in respect of maintenance. The reasons given in *Haridas Acharjia Chowdhry* v. *Baroda Kishen Acharjia Chowdry.*[2] equally apply to private alienation. As to the other question, there was no antecedant relationship either in *Chunni Kuar* v. *Rup Singh*[8] or *Husain Baksh* v. *Rahmat Husain*[12]. The sole test is whether the lender is looking for a compensation for the risks he runs or is trying to get what the necessitous circumstances of the borrower compels him to submit to.

1. (1899) I.L R. 22 M. 372.
2. (1899) I.L.R. 27 C. 38.
3. (1909) 2 K.B. 958.
4. (1907) I.L.R. 32 B. 37.
5. (1907) I.L.R. 32 B. 208.
6. (1906) I.L R. 34 C. 150; 34 I.A.9.
7. (1906) I.L.R. 28 A. 570 ; 33 I.A. 118.
8. (1888) I L.R. 11 A. 57.
9. (1909) I L.R. 31 A. 386.
10. (1902) I. I.L.R. 29 C. 823.
11. (1903) I L.R. 31 C. 233.
12. (1888) I. L. R. 11 A.128.

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Neither *Dhanipal Das* v. *Maneshwar Singh* [1] nor *Sundar Koer* v. *Rai Shaon Kishen* [2] nor *Satish Chunder* v. *Hem Chander* [3] shows that an antecedent relationship is necessary. The observation in *Dhanipal Das* v. *Maneshwar Singh* [1] shows that exorbitant rate of interest itself may be an indication of undue influence. Reference was also made to the guarded expression in *Umesh Chandra* v. *Golap Lal* [4] and it was further submitted that *Ganesh* v. *Vishnu* [5] went too far, though perhaps, on the facts of the case, the decision was right.

The Court delivered the following

JUDGMENT:—Two points have been taken in this appeal:—(1) that a right to future maintenance is not transferable and that, consequently, the mortgage by the 1st defendant to the plaintiffs of her right to future maintenance is ineffective; and (2) that the contract was induced by undue influence.

As regards the 1st point, we are of opinion that a right to future maintenance is not an interest in property restricted in its enjoyment to the owner personally within the meaning of Clause (*d*) of S. 6 of the Transfer of Property Act. Our attention was called to an observation in SHEPHARD and BROWNE'S *Commentaries on the Transfer of Property Act*, 6th edition, page 45, occurring in the Notes to Clause (*d*) where the learned authors observe that it seems clear that a widow's right to future maintenance cannot be made the subject of a sale or other transfer by her since it exists for her personal benefit only, and they further observe that it may be doubted whether she could lawfully transfer her interest in property allotted to her for her maintenance. In the two cases, however, which the learned authors cite with regard to the latter observation, the question was one of the right of attachment with reference to the provisions of S. 266 of the Code of Civil Procedure. We do not think that a right to future maintenance is property within the enabling words of S. 6 of the Transfer of Property Act, or an interest in property restricted in its enjoyment to the owner personally within the meaning of Clause (*d*).* Consequently, as it seems to us, this question must be considered apart from the provisions of the Transfer of Property Act. The fact that the transfer is not recognized by the Transfer of Property Act is not conclusive on the question of its validity. See *Palaniappa* v. *Lakshmana & others* [6]. As regards the cases there is, so far as we

*[Cf. *Asad Ali Molla* v. *Haidar Ali*; (1910) 12 C.L.J. 130=14 C.W.N. 918 ED.]

1. (1906) I. L. R. 28 A. 570; 33 I. A. 118.
2. (1906) I. L. R. 34 C. 150; 34 I. A. 915.
3. (1902) I. L. R. 29 C. 823
4. (1903) I. L. R. 31 C. 233.
5. (1907) I. L. R. 32 B. 37.
6. (1893) I. L. R. 16 M. 429 at 434.

know no authority on the point, except an observation in *Bhyrub Chunder Ghose & another* v. *Nubo Chunder Gooho & another*[1] where the question for determination was whether a widow's right to maintenance could be sold in execution of a decree; an observation by *West* J. in *Narbada Bai* v. *Mahadeo Narayan, Kashinatt Narayan & Shama Bai*[2] citing *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho*[1], *Mussamat Duloor Kunwar* v. *Sunjeev Singh & others*[3], and *Monesur Doss* v. *Maharajah Kishen Protab Sahu* & *another*[4] which were also cases of attachment. As regards the right to attach, the question is now governed by S. 266 of the Code of Civil Procedure. The enactment in the Code of Civil Procedure that a right to future maintenance should not be liable to attachment is presumbly based on grounds of public policy. Section 266 was enacted in the same year as the Transfer of Property Act. It may be that voluntary alienations of rights for future maintenance should be prohibited as well as the taking of such rights in execution. The Legislature have not thought fit to prohibit them. We are not prepared to say that, at any rate where, as here, the amount payable is subsequently fixed by agreement or by decree, a widow's right to maintenance from her late husband's estate is inalienable.

As regards the 2nd point, the question must be considered, not with reference to doctrines of equity, but with reference to the amended Section 16 of the Contract Act only—see the judgment of the Privy Council in *Dhanipal Das* & *another* v. *Maneshwar Bakhsh Singh*[5]. In the case before us, the rate of interest payable under the deed on the advance of Rs. 1,500 is 100 per cent. The principal and interest are to be repaid in a year, and in default of payment interest on principal and interest at compound rate at 1 p. c. a month with 6 months' rests is payable. The fact that the bargain was a hard one is of course no ground in itself for granting relief, and urgent need of money on the part of the borrower does not of itself place the lender in a position to "dominate his will" within the meaning of S. 16 of the Contract Act as amended in 1899—see *Sundar Koer* v. *Raishan Kishen*[6]. The question is:—"Were the relations between the parties such

1. (1866) 5 W. R. p. 111.
2. (1880) I. L. R. 5 B. 99 at p. 104.
3. (1867) 7 W. R. 311,
4. (1875) 23 W. R. 427.
5. (1906) I. L. R. 28 A. 570 at 583.
6. (1906) I. L.R. 34 C. at 150.

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that one of the parties was in a position to dominate the will of the other ?" We think "relations" means not only the personal relations but the circumstances in which the contract was entered into. Here we have a contract between a money-lender and a widow entered into for the purpose of enabling the widow to establish her right to maintenance. The widow's evidence, which does not seem to have been shaken in cross-examination, was that she was in a poor state when she executed the document, and that her husband died ten years before and that she had no means for maintenance in the interval. The transaction was, no doubt, completed through a vakil who, in a sense, may be said to have advised the widow, but the fact that she acted under advice does not, in our opinion, preclude her from asking for relief on the ground that the contract was induced by undue influence, or the Court from exercising the jurisdiction given by S. 19-A of the Contract Act. Although it is no longer open to us to deal with this case on equitable grounds, apart from the statute, the cases decided before the amendment of the Contract Act may be referred to as throwing light on the question as to what circumstances will give rise to relations which place one party to a contract in a position to dominate the will of the other party. We do not propose to discuss all the authorities cited in argument. We need only refer to the decisions of the Privy Council in *Rajah Mokkam Sing & others* v. *Rajah Rup Singh & others*[1] before the amendment of the Contract Act and to *Manesher Baksh Singh* v. *Shadi Lal & others*[2] since the amendment of the Contract Act where agreements were held to be not enforceable. The facts of the present case, it seems to us, raise a case for relief at least as strong as those in the cases to which we have referred.

We hold then, on the evidence, that the plaintiff was in a position to dominate the will of the defendant. We also hold that the bargain, on the face of it and on the evidence, was unconscionable. We think Illustration (*c*) to S. 16 of the Indian Contract Act applies and not Illustration (*d*). Under Sub-S. 3 of the section the burden was on the plaintiff to prove that the contract was not induced by undue influence and, in our opinion, he has failed to discharge it.

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1. (1893) I.L.R. 15 A. p. 352.
2. (1909) I.L.R. 31 A. 386.

We modify the decree of the Subordinate Judge and give the plaintiff a decree for the amount of the advance with interest at 24 p. c. per annum from the date of the bond to the date fixed for payment, and with further interest at 6 p. c. on the total amount due from the date fixed for payment to the date of payment. The mortgage will stand. Annapurni Nachiar v. Swaminatha Chettiar.

Payment will be made within three months from this date. The parties must pay their own costs throughout. We appoint a receiver by consent.

[See on the first point *Tara Sundari Debi* v. *Sarodh Charan Banerji*[1].—ED.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Malikka Meladathil Karnavan Kunji Achammal .. .. Appellant *

v.

Malikka Meladathil Karnavan Kunji Achammal .. .. Respondent.

Court Fees Act, S. 7, Para 4, Cl. (c)—Fees on suit for declaration that deed is not binding. Achamma v. Achammal

The question whether S. 7, Para 4, Cl. (c) of the Court Fees Act applies or not must depend on the substance of the claim and not on the mere words which a plaintiff may choose to introduce into his plaint with reference to it. *Held* that a suit wherein the plaintiffs prayed for declaration that a Jenm sale deed of the suit properties was not valid and binding on the tarwad of the plaintiffs, almost all the plaintiffs having been parties to the deed through their mother as guardian, should be stamped with *ad valorem* fee as for cancellation of the deed.

Appeal from the order of the Court of the Subordinate Judge of Palghat in O. S. No. 39 of 1903.

Suit for a declaration that the Jenm sale (*i.e.*, outright sale) of the suit properties is not valid and binding on the Tarwad of the plaintiffs and defendants 2 to 16.

There were 25 plaintiffs in the suit; of these 2 to 25 were minors. The first plaintiff sued for himself and as the next friend of the minor plaintiffs 2 to 25. The sale deed sought to be declared invalid had been executed by all the members of the Tarwad

1. (1910) 12 C.L.J. 146.

*A. No. 108 of 1905. 2nd February 1910.

Achammal v. Achammal.

except the first plaintiff, the minor members, *viz.*, plaintiffs 2 to 25, being represented in the sale deed by their mothers as their guardians. The first plaintiff was the senior *anandaravan*; the second defendant the *karanavan*, the other adult members of the family being defendants 2 to 16. The properties comprised in the sale deed were all outstanding on the date of the sale in the hands of *kanomdars*.

The plaintiff paid a Court-fee of Rs. 10 only, treating the suit as one for declaration.

The Sub-Judge held that the Court-fee paid was insufficient; that the suit was substantially one for the setting aside of the sale deed; and that an *ad valorem* fee computed on the amount of the consideration *minus* the amount of the *kanoms* must be paid. Accordingly he returned the plaint for making up the deficient stamp duty. The plaintiffs did not pay the stamp duty within the time fixed by the Sub-Court. The plaint was therefore rejected. The present appeal is against this order rejecting the plaint.

J. L. Rozario (with him *Kunjuni Nair*) for appellant.

T. V. Seshagiri Aiyar (with him *A. Nilakanta Aiyar*) for respondent.

J. L. Rozario:—The Sub-Judge erred in regarding the suit as one for setting aside the sale. The suit is for declaration, and the Court-fee paid is sufficient. For the purpose of determining the Court-fee payable, what the plaintiffs actually ask for is the only thing to be looked at—*Zinnatunessa* v. *Goundranath*[1]. A bare declaration is all that plaintiffs need ask for—*Unni* v. *Kunhi Umma*[2].

T. V. Seshagiri Aiyar:—In order to determine whether the suit falls under S. 7, Para 4, Clause (*c*), the substance of the claim and not the words which the plaintiff chooses to use must be considered—*Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon*[3]. The deed is only voidable and not void. The alienation was by all the members of the Tarwad except the 1st plaintiff, and it is therefore presumptively void—A. S. 103/98. A sale by a Karanavan stands on the same footing as sales by guardians, Managers of Hindu families and Hindu widows. Sales

1. (1903) I.L.R. 30 C. 788. 2. (1890) I.L.R. 14 M. 26.
3. (1906) I.L.R. 30 M. 18.

by these latter are voidable only. For sales by guardians see *Gnansambandha Pandara Sannidhi* v. *Velu Pandaram*[1]; *Lachia* v. *Mahalinga*[2]; *Malikarjun* v. *Narhari*[3] overruling *Bhagvant* v. *Kondi*[4] and *Sikher Chund* v. *Dulpatty Singh*[5]; see also Art. 44 of the Limitation Act. In Act IX of 1871 there was no article corresponding to this. For sales by Managers see *Hanuman Kamat* v. *Hanuman Mandur*[6]; see also Limitation Act, Art. 126. For sales by a Hindu widow see *Mohusudan* v. *Rooke*[7]; *Bijoy Gopal Mukerji* v. *Nil Ratan Mukerji*[8]; *Chunder Nath Bose* v. *Ram Nidhi Pal*[9]; *Unni* v. *Kunhi Amma*[10] relied on by the other side follows. This cannot be considered to be good law now—*Mallikarjun* v. *Narhari*. Achammal v. Achammal.

The minors were parties to the sale. They cannot, at any rate, get a mere declaration. They must sue to set aside the deed.

Kunjunni Nair replied.

The Court delivered the following

JUDGMENT :—In this case the plaintiffs Nos. 2 to 25 were through their guardians parties to the deed regarding which the declaration is sought. If a declaration were given that the deed is not binding on these plaintiffs the result would be the same as if the deed were cancelled. As observed in *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopal Menon*[11] the question whether S. 7, Para IV, Clause (*c*) of the Court Fees Act applies or not must depend on the substance of the claim and not on the mere words which a plaintiff may choose to introduce into his plaint with reference to it. The prayer, so far as plaintiffs Nos. 2 to 25 are concerned, must, therefore, be taken to be a prayer for the cancellation of the deed, and the Subordinate Judge was right in holding that *ad valorem* fee must be paid. We therefore dismiss this appeal with costs which will be calculated in both Courts in the manner usual in a suit capable of valuation as this suit clearly is. The objection memo is allowed with costs.

1. (1899) I.L.R. 23 M. 271.
2. (1907) 17 M.L.J. 220.
3. (1900) I.L.R. 25 B. 327.
4. (1889) I.L.R. 14 B. 279.
5. (1879) I.L.R. 5 C 463.
6. (1891) 19 C 123 (P.C.)
7. (1897) I.L.R. 25 C 1
8. (1903) I.L.R. 30 C 990.
9. (1902) 6 C.W.N. 863.
10. (1890) I.L.R. 14 M. 26.
11. (1906) I. L. R. 30. M. 18.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

The Secretary of State for India in Council represented by the Collector of Kistna.. Appellant* (*1st Defendant*)

v.

Pisipati Sankarayya & others .. Respondents (*2nd Plff. & Defts. Nos.* 2 & 3).

The Secretary of State for India v. Pisipati Sankarayya.

Madras Acts—Revenue Recovery Act II of 1864 *S.* 42—*Sale of land included in puttah other than that in respect of which arrear is due—Sale not free of incumbrances.*

S. 2, Act II of 1864, does not mean that any particular land is security for the public revenue only in so far as that revenue is asessed upon itself. Where a defaulter holds two plots of land in the same district, free of encumbrances both are liable to be sold under S. 42 of the Act in respect of the arrear due upon either.

Second appeal from the decree of the Court of the Subordinate Judge of Masulipatam in A. No. 61 of 1907 presented against the decree of the Court of the District Munsif of Gudivada in O. S. No. 363 of 1905.

For the facts of the case see the judgment of *Munro* J. *infra.*

The Government Pleader (*C. F. Napier*) for appellant.

P. Narayanamurthy for respondents.

The Government Pleader contended that the authority of *Narayana Raja* v. *Ramachandra Raja*[1] is considerably shaken by *Subrahmania* v. *Mahalingasami*[2] and referred to Ss. 48 and 59 of the Revenue Recovery Act, observing that they were clear and did not admit of any interpretation other than that the sales in all cases were clear of incumbrances; that Act I of 1890 only confers a privilege or exemption and does not supply a guide for the interpretation of the earlier Act; that *Narayana Raja* v. *Ramachandra Raja* [1] is a case of an absolute assignment and the Act made a distinction between the absolute interest and fractional interests, and when the person holding the fee is the defaulter and the land is sold, the fractional interests are swept away. He referred also to the definition of "immoveable property" in Act I of 1897 and said that it would not apply to this Act.

P. Narayanamurthi contended that *Narayana Raja* v. *Ramachandra Raja* [1] was clearly in his favour; that it is by the conjoint operation of S. 2 and S. 42 that a sale is free of all incumbrances; but for such declaration prior incumbrances would

*S. A. No. 1213 of 1908 — 7th April 1910.

1. (1902) I. L. R. 26 M. 521.
2. (1909) I.L.R. 33 M. 41.

not be swept away, and on the interpretation suggested S. 2 was wholly unnecessary. He also pointed out the distinction between the wording of S. 36 and S. 42, and referred to S. 17 of the Revenue Recovery Act which says that claims in hypothecation, &c., respecting moveable property not being produce of the ground in respect of the arrears due, are to be preferred as supplying the clue for the construction of S. 42 and relied upon *Chinnasawmy* v. *Tirumalai Pillai*[1], *Ramachandra* v. *Pitchaikannu*[2], and *Secretary of State for India* v. *Narayana*[3] as supporting his view. When once an interest is carved out, the entire property can no longer be said to be the immoveable property of the alienor. Whether the interest conveyed is the absolute interest or fractional interest cannot, on principle, matter. For the purposes of Government, each pattah represents a separate individual.—Board's Standing Orders?(1907 Edn.)

The Government Pleader replied.

The Court delivered the following

JUDGMENTS.—*Miller* J. :—I think it is beyond doubt that what was sold in this case was land of the defaulter within the meaning of Act II of 1864, and the question is why should not the provisions of S 42 be applied to the sale?

The learned Vakil for the 1st respondent with the aid of an ingenious piecing together of *dicta* to be found in *Secretary of State for India* v. *Narayana*[3], *Narayana Raja* v. *Ramachandra Raja*[4], and *Ramachandra* v. *Pichaikannu* [2] presents for our acceptance the conclusion that the sale is not free of incumbrances because the land sold is not by S. 2, made security for the public revenue for which it was sold. His construction of S. 2 is not established by any of the cases, and I am not prepared to decide that it is correct, but assuming its correctness I cannot see how the plain words of S. 42 are to be limited by reference to S. 2. A sale may be free of incumbrances whether or not it is held to enforce a first charge, the liens being all transferred to the proceeds.

In *Ramachandra* v. *Pichaikannu*[2] the learned Judges no doubt observe that the intention is clear that the purchase is free

1. (1884) I.L.R. 25 M. 572.
2. (1884) I. L. R, 7 M. 434.
3. (1884) I. L. R. 8 M. 130.
4. (1902) I.L. R. 26 M. 521.

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of prior incumbrances only when the arrear is of public revenue of which the land is the first security by statutory declaration, but there is nothing to suggest that they construed S. 2 in the way we are asked to construe it; they were not dealing with that question, and their dictum was intended to support their view that a sale for arrear of revenue due under a different statute is not by virtue of S.42 of Act II of 1864 free of encumbrances. I venture to think that if they are right as to the intention of the legislature we must construe S. 2 as declaring all the land of a landholder to be security for all the land revenue payable by him, for the intention, as expressed in S. 42 is, to my mind, very plain—every sale of land conducted under the Act is to be free of encumbrances.

The sale in question is a sale of land under the Act, and I would, therefore, allow the appeal and dismiss the suit with costs of the 1st defendant throughout.

Munro J.:—The third defendant held lands in Kalidivide under one pattah and lands in Sana Rudravaram under another pattah. All these lands were mortgaged to the plaintiff. Arrears of revenue having, subsequent to the mortgage, accrued on the lands in Kalidividi, those lands were attached and sold at auction by the Revenue authorities, and as the proceeds did not cover the whole of the arrears due the lands in Sana Rudravaram were attached and sold for the balance and were purchased by the 2nd defendant. The plaintiff then brought the suit, out of which this second appeal arises, to have the revenue sale of the Sana Rudravaram lands set aside and also for a declaration that the lands remained subject to his mortgage. The District Munsif refused to set aside the sale but gave a declaration that the sale was subject to the plaintiff's mortgage. This decree was confirmed by the Subordinate Judge on appeal. The present second appeal is by the Secretary of State for India in Council and questions the propriety of the above declaration.

The villages of Kalidividi and Sana Rudravaram are in the same District.

Act I of 1890 has, therefore, no application and the point at issue must be decided solely in accordance with the provisions of Madras Act II of 1864. Under S. 5 of that Act an arrear of revenue may be recovered by the sale of the defaulter's moveble and immoveable property and also by the execution against

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defaulter's person. There is nothing in the section to restrict the land that may be sold thereunder to the land on which the arrear of revenue has accrued. It is clear, therefore, that for the arrear which accrued on the 3rd defendant's land in Kalidividi the lands included in his Sana Rudravaram pattah were liable to be sold if in the eye of the law they were his property at the time of the sale. The only ground on which it is suggested that they were not his property is the fact that they had been mortgaged to the plaintiff prior to the sale.

S. 42 of Act II of 1864 provides that all lands brought to sale on account of arrears of revenue shall be sold free of all incumbrances. From this it is clear that land may be sold for arrears of revenue, notwithstanding the fact that the defaulter has created an incumbrance upon it, and as under S. 5 it is only land belonging to the defaulter that can be sold for an arrear due by him, it follows that under the Act land which a defaulter has encumbered is considered to be none the less his property.

The 3rd defendant's land in Sana Rudravaram was therefore liable to be sold for the Kalidividi arrears and under S. 42 of Act II of 1864 the sale must be considered to have been free of the plaintiff's mortgage. It is contended that the result is inconsistent with the provisions of S. 2 of the Act. That section lays down that the land, among other things, shall be regarded as the security for the public revenue. This language does not necessitate our reading the section as meaning that any particular land is security for the public revenue only in so far as that revenue is assessed upon itself. The Courts below relied upon *Narayana Raju* v. *Ramachandra Raju.*[1] That case is not, however, on all fours with the present case, for there it was held that owing to a prior Civil Court sale the defaulter had no interest in the land at the time of the revenue sale. I would, therefore, reverse the decrees of the Court below and dismiss the suit with costs of the 1st defendant throughout.

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1. (1902) I.L.R. 26 M. 521.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Vuppuluri Tatayya *alias* Veeranna .. Appellant*
v. (*Plaintiff*)
Garimalla Ramakrishmamma & others .. Respondents
(*Defendants*).

Veeranna v. Ramakrishmamma.

Hindu Law—Reversioner—Alienation by daughter, life estate holder, for spiritual benefit of father, last male holder—Pushkaram festival—Daughter bound to perform shradh.

A gift by a daughter, who has inherited her father's property, of a small portion thereof for the spiritual benefit of her father cannot be impeached by the reversioner if the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus. A daughter taking the property of her father should perform the *shradh* of her father.

The gift or expenditure should have reference to the spiritual needs of the father or husband whose property is taken. The gift of land is a suitable appendage to a shradh ceremonial and is highly meritorious.

Obiter:—The daughter inheriting the property from her father is not entitled to expend it for the spiritual needs of her husband, though it cannot be said that under no circumstances can the father's property be so used.

Held that a gift by a daughter of 49 cents of land out of 19 acres inherited by her from her father on the occasion of the *Pushkaram* at Rajahmundry was good, and binding on the reversioners.

Second appeal from the decree of the Court of the Subordinate Judge at Cocanada in A. S. No. 80 of 1906 presented against the decree of the Court of the District Munsif of Peddapur in O. S. No 17 of 1905.

Plaintiff claimed as reversioner to succeed to the estate of V. Krishnamma the last male holder who died about 40 years ago leaving a daughter named G. Lakshmamma. The daughter died in 1900. In 1897 the daughter performed the *shradh* of her father at the Godaveri *Pushkaram*, and as part of it made a gift of some lands (49 cents) to the 3rd defendant in the suit. The extent of lands inherited by her was 19 acres and odd, besides houses and moveables. The Munsif gave a decree for plaintiff, holding that the daughter had no right to make a gift of lands. The Sub-Judge in appeal upheld this gift on the

*S. A. No. 396 of 1908. 12th April 1910.

ground that the gift was for pious and spiritual purposes, namely, the benefit of her father's soul, and dismissed the plaintiff's suit.

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P. Nagabhushanam for appellant.

P. Narayanamurthi for respondent.

P. Nagabhushanam :—The only question is whether a daughter can make a gift of lands for the spiritual benefit of her father. My submission is that the daughter has no such right. *Raichunder Deb Biswas* v. *Sheshoo Ram Deb* [1] is a case where a daughter sold property for the expenses of her mother's *shradh*. It was held that the alienation was invalid. Other cases deal with widow's alienation—MAYNE, p. 849 ; *Rama* v. *Ranga* [2]; *Lakshmi Narayan* v. *Dassee* [3]; *Puran Dai* v. *Jai Narain* [4] ; *Ram Kawal Singh* v. *Ram Kishore Das* [5].

P. Narayanamurthi—According to the texts the powers of a daughter are greater than those of a widow, at least as large as those of a widow. A daughter is entitled to perform *shradh* to her father. There was no other person nearer than the daughter to peform the *shradh* of the deceased. *Theertha shradh* is one of the shradhs enjoined by the *shastras*. It is for the spiritual benefit of the deceased. In this case, even supposing it is not a spiritual necessity it will be a pious act. The gift was of a very small proportion of land. If the doing of an act is proper, an act incidental to it is not invalid. The extent of property alienated is only 18 cents. The property inherited is about 19 acres besides houses and other moveables—SARVADHIKARI on *Inheritance* p. 110; *Chowdhry Jummenjoy Mullick* v. *Rasmoyee Dossee* [6] ; this last case has been doubted by GHOSE,see his *Hindu Law*, p. 253; also *Rustam Singh* v. *Moti Singh* [7]; *Ramasamy* v. *Vengidesam* [8]; *Ram Kawal Singh* v. *Ram Krishore Das* [5]; *Raichunder Deb Biswas* v. *Shesoo Ram Deb Rama* v. *Ranga.* [2]

P. Nagabhushanam in reply cited 2 COLEBROOK'S *Digest* 576.

1. (1867) 7 W. R. 146.
2. (1885) I. L. R. 8 M. 552.
3. (1887) I. L. R. 11 M. 288.
4. (1882) I. L. R. 4 A. 482.
5. (1895) I. L. R. 22 C. 506.
6. (1868) 10 W. R. 309.
7. (1896) I. L. R. 18 A. 474.
8. (1898) I. L. R. 22 M. 113.

Veeranna v. Ramakrishmamma.

The Court delivered the following

JUDGMENT:—The second appeal is argued as regards the validity of the gift of Item No. II. Lakshmamma who succeeded to estate of her father on his death in the sixties made a gift of 49 cents of her father's property to the 3rd defendant. The extent of land which came to her from her father was about 19 acres, apart from houses and house sites and moveable property. The gift was made on the occasion of the *Pushkaram* at Rajahmundry, a peculiarly holy event amongst Hindus which happens once in twelve years. She was the person to perform her father's *shradh* on his death, there being no brothers and her mother having died before him. She performed the *shradh* on the occasion of the *Pushkaram* and made the gift of the land as part of the *shradh* ceremony. The plaintiff, a reversioner, impeaches the gift.

Under the Hindu Law in force in this Presidency the daughter is limited owner like the widow, and her powers of alienation as regards property which she has inherited from her father are no greater than those of the widow, and we are inclined to hold that they are not less. The test however is, apart from cases of temporal necessity, whether the alienations are for the spiritual purposes of the deceased father or husband. The daughter inheriting property from her father is not entitled to expend it for the spiritual needs of her husband, though it cannot be said that under no circumstances can the father's property be so used. However this may be, if the expenditure by the daughter is for the spiritual needs of the father's soul, it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband. There may be a question as to whether the daughter is competent to minister to the spiritual needs of a father in all those ways in which the widow is competent to serve the spiritual needs of her husband. But if, according to the ceremonial law, it is incumbent on the daughter to serve the spiritual necessities of her deceased father whose property she inherits, we are not justified in dealing with her alienation of her father's properties for such necessities in a manner different from a widow's alienations under like circumstances.

In this case the daughter succeeded to her father's property. She was also the person bound to perform his *shradh* at his death. The duty in respect of funeral and annual ceremonies is

laid down by writers on the ceremonial law. RAJKUMAR SARVADHIKARI in his *Tagore Law Lectures* names her at p.110 as "the person entitled to perform *shradha* rites on failure of the widow." Mr. GHOSE in his *Hindu Law* names her among the persons competent to perform the *shradh*, at p. 63. SARVADHIKARI relies on the authority of the *Dharma Sindhu* from which he quotes largely. In the Bombay Sanskrit edition of the *Nirnaya Sindhu*, at p. 287, the author says: "The daughter performs the *shradh* to the deceased father as she takes the property." In the *Shradha Kanda* of VAIDIANATHA DIKSHITA, published by NARAYANA SASTRI in Grantha characters, the daughter's duty to perform her father's *shradh* is laid down in pages 23 and 26. He says the daughter performs the *shradh* in the absence of the son, etc., and gives the order at the bottom of p. 26 thus: "The son born, the grandson, his male descendants, the *putrika putra*, his descendants, the adopted son, his issue, the daughter's son who inherits, the daughter's son, the widow, the husband, the son of a co-wife, the daughter, the brother, the brother's son, etc." The performance of the *shradh* being enjoined, the *Nibandhana* writers are agreed that a visit to a *Theertha* or holy place is a proper occasion for the performance of a *shradh*. Reference is made by SARVADHIKARI in the foot-note at page 101 to the *Theertha shradha* on the authority of *Dharma Sindhu*. The *Nirnaya Sindhu* (Bombay Sanskrit edition) speaks of it at p. 379. The *Madhaviya*—published as Volume 48 of the Bombay Sanskrit series—lays down the duty of performing the *shradh* on occasions of visits to holy places and on the occurrence of sacred conjunctions—see pages 301 to 307. So does the *Vaidhyanatha Dikshitya* dwell in great elaboration on the peculiarly sacred occasions when the performance of *shradh* is enjoined. That the banks of the Godavari—which is a sacred river—would, according to Hindu ideas, be a fitting place for the performance of the *shradh* cannot be questioned. That the occurrence of the Godavari Pushkara would largely enhance the sacredness of the place is also an accepted item of orthodox belief. The gift of land is a suitable appendage to the *shradh* ceremonial, and is laid down in ceremonial treatises as highly meritorious. The *Madhaviya* at p. 436 and the *Vaidhyanatha Dikshitya* at p. 359 (the editions are those already referred to) refer to the gift of land as part of the *shradh* ceremonies. It is therefore

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clear that the gift in the present case of a very small extent of the father's property was in accordance with Hindu ideas as regards the daugther's duty in connection with the performance of a father's *shradh* on the occasion of the Godaveri Pushkara. It has sometimes been said that the gift of property is justifiable if it is in performance of indispensable acts of duty or religious necessity—see *Rama* v. *Runga* [1] and *Lakshmi Narayan* v. *Dassee* [2]. In the first of these cases the sale by the widow of nearly all the property she inherited from her husband for the expenses of pilgrimage was held unjustifiable. In the second case of a gift to a pro-Brahmin introduced into a family by widows for the performance of their husbands' shradhs, it was held that the gift was for indispensable necessity and of a small portion of the husband's property, and therefore valid. But we do not think we can lay down the rule that to justify the alienation the expenditure should be for a spiritual necessity. We have already said that the gift or expenditure should have reference to the spiritual needs of the father or husband whose property is taken. Where it was only for the widow's spiritual benefit as in *Puran Dai* v. *Jai Narain* [3] or for the endowment of a temple built by the mother-in-law as in *Ram Kawal Singh* v. *Ram Kishore Das* [4] the gift was, undoubtedly, without justification. The case of *Raichunder Deb Biswas* v. *Sheshoo Ram Deb* [5] is not quite intelligible, and we are not clear that the head note is supported by the somewhat laconic judgment. It is said that the sale of the property by the daughter for the mother's *shradh* was invalid. The appeal itself appears to have been dismissed, which would rather support the view that the alienation was held good. But none of these cases which were relied on by Mr. Naghabhushanam is authority for the position that the alienation must be for an indispensable spiritual duty to support the alienation. It can hardly be supposed that a Hindu widow paying a visit to Gaya or Sethu is not justified in incurring reasonable expenditure for the purpose or in making a gift of land on the occasion of the *shradh* there performed for the spiritual benefit of her husband's soul. Mr. Justice *Dwarka Nath Mitter*—a high authority on such

1. (1885) I. L. R. 8 M. 552.
2. (1887) I. L. R. 11 M. 288.
3. (1882) I. L. R. 4. A. 482.
4. (1895) I. L. R. 22 C. 506.
5. (1867) 7. W.R. 146.

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a question—held in *Chowdry Jummenjoy Mullick* v. *Rasmoyee Dossee*[1] that a sale for the expenses of her husband's mother's *shradh* by a Hindu widow was justifiable even though the actual performer of the ceremonies was the husband's brother. We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited, and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner. We are obliged to express ourselves somewhat guardedly because almost every gift according to Hindu notions is as such calculated to promote spiritual merit and the occasions for the performances of ceremonies calculated to bring spiritual reward are so innumerable that almost any expenditure not for a sinful object and any alienation by way of gift may be attempted to be justified as ministering to spiritual benefit. We do not think that Hindu lawyers contemplated such an exercise of the power of alienation by a limited owner. It is to be regretted that we have not found ourselves in a position to lay down a a more definite rule for practical application. In *The Collector of Masulipatam* v. *Cavaly Venkata Narainappa*[2] the Privy Council said : "For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she (the widow) has a larger power of disposition than that which she possesses for purely worldly purposes." Their Lordships did not attempt to further define the spiritual purpose. We have endeavoured to suggest the further limitation that the spiritual purpose should be such as is regarded by the Hindu community as reasonable and proper though not absolutely necessary. We think the alienation in the present case falls within the rule. We must dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson & Mr. Justice Krishnasawmi Aiyar.

Kondapa Rajan and others .. Appellants.*

v.

Dwarakonda Suryanarayna & others .. Respondents.

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*S A. No. 468 of 1908. 4th March, 1910.

1. (1868) 10 W.R. 309. 2. (1861) 8 M. I. A. 520 at p. 551.

Kondappa Rajan v. Dwarakonda Suranarayana.

Possessory title— Water course—Incorporeal rights.

Incorporeal rights are in many cases capable of possession just as much as rights to corporeal hereditaments, and there is no distinction in principle between the rights of a person without title in possession of land for less than the statutory period to the possession thereof and those of a person in similar enjoyment of a water course; and consequently the latter is entitled to be protected as against all but the true owner in his enjoyment.

Second appeal from the decree of the District Court of Ganjam in A. S. No. 80 of 1906 presented against the decree of the District Munsif of Chicacole in O. S. No. 367 of 1905.

The Advocate-General (*P. S. Sivaswami Aiyar*) for appellants.

P Narayanamurthi for *V. Ramesam* for respondents.

The Advocate-General—contended that there having been no completed right by prescription against the zamindar, a disturbance of such right can give no cause of action, and cited POLLOCK on *Torts*, p. 35.

P. Narayanamurthi cited *Jeffries* v. *Williams*[1]; *Dhuman Khan* v. *Mohamin Khan*[2]; *Achanna* v. *Venkamma*[3].

The Advocate General in reply suggested a distinction between cases where the party in possession of his land is in the course of acquiring a prescriptive right of light, or of support, and the cases where the right which is to be acquired is a right to take water which is the result of a trespass on another's land.

The Court delivered the following

JUDGMENT:—The plaintiffs were in enjoyment of a water-course. For the purpose of this case we may assume that they had not acquired an easement by prescription, for the enjoyment did not extend to 20 years. The defendants who have no manner of right to the water-course or the land over which it flowed, obstructed the plaintiff's user. The District Judge has given the injunction asked for. It is argued by the learned Advocate-General that the plaintiffs not having acquired a complete title they would not be entitled to restrain the defendants from interference. The law is well settled that if the plaintiff was in possession of land for less then the statutory period, he would be entitled to protect that possession against any one but the true owner. We do not think that there

1. (1850) 5 Ex. Rep. 792.
2. (1896) I. L. R. 19 A. 153.
3. (1894) 5 M. L. J. 24.

is any distinction in principle because the right now claimed to be protected is in the nature of an incorporeal right in process of acquisition. Incorporeal rights are in many cases capable of possession just as much as rights to corporeal hereditaments. In *Jeffries* v. *Williams* [1] it was held by Baron *Parke* that a trespasser on adjoining land was not entitled to cause a subsidence by working mines to the prejudice of the mines in the plaintiff's enjoyment though he had not acquired a title to the same. This was followed in *Elizabeth Bibby* v. *Carter* [2] where the plaintiff who had not acquired a title was held to be entitled to sue for damages against a trespasser on adjoining land who caused injury to the plaintiff's buildings. The principle of these cases had been extended in India to cases of light where before the right had matured a trespasser interfered with it—see *Jooher Achanna* v. *Vanamala Venkamma* [3] and *Dhuman Khan* v. *Mahammud Khan* [4]. We think that the District Judge is right in applying the same principle to the present case of a water course enjoyed for less than the prescriptive period.

Kondappa Rajan v. Dwarakonda Suryanarayana.

We must dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Rajah Damara Kumar Thimma Nayanim Bahadur Varu	..	Appellant* (*Plaintiff*)
v.		
Bukkapatnam Venkata Charlu & others	..	Respondents
	..	(*Defendants*).

C. P. C., S. 105 (*O.C., S.* 591)—*Ground of appeal from interlocutory order in appeal from final decree.*

Thimma Nayanim v. Venkata Charlu.

S. 591, C. P. C. (Act XIV of 1882) allows an appeal from a final decree though it is solely confined to an objection to an interlocutory order disallowing a petition for amendment of the plaint.

Second appeal from the decree of the Court of the Subordinate Judge of North Arcot in A. S. No. 29 of 1905 presented against the decree of the Court of the District Munsif of Tirupati in O. S. No. 462 of 1902.

* S. A. 1041 of 1907. — 12th April 1910.

1. (1850) 5 Ex. Rep. 792.
2. (1860) 4. H. and N. 63.
3. (1894) 5. M. L. J 24.
4. (1896) I. L. R. 19. A. 153.

Thimma Nayanim v. Venkata Charlu.

Plaintiff sued for Rs. 812-4-8 being the value of straw due from the defendants. The decree was for Rs. 450. The plaintiff, in his plaint, gave credit to Rs. 300 deposited with him by the 1st defendant in connexion with the straw affair. Long after the issues were settled, plaintiff made an application to the first Court that he had wrongly given credit to Rs. 300, that the plaint should be amended in that respect, and that he should be decreed the Rs. 300 and its interest. The Munsif disallowed the amendment prayed for and passed a decree for Rs. 450 as above stated. The plaintiff in his appeal, which was nominally against the decree, attacked only the order on his petition for amendment. On a preliminary objection being taken by the defendants (respondents) the lower appellate Court dismissed the appeal, holding that as the appeal was directed solely against the interlocutory order no appeal lay. Against that the plaintiff appealed.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for appellant.

C. R. Thiruvenkata Chariar for respondents.

L. A. Govindaraghava Aiyar:—The lower Court is wrong in dismissing the appeal as not maintainable simply because the appeal grounds attacked only the order on the petition. I appealed against the whole decree itself and not against the order alone. The view of the case quoted by the lower appellate Court—*Sher Singh* v. *Diwar Singh*[1]—has not been approved of in our High Court—*Sankaralinga Mudali* v. *Ratna Sabapathi Mudali*[2] and *Godavari Samulo* v. *Gajapathi Narayana Deo*[3] doubting *Causanel* v. *Gomez*[4]. Every interlocutory order need not be appealed against—*Maharaja Moheshar Singh* v. *Bengal Government*[5]. Reference was also made to *Sheonath* v. *Samnath*[6]; *Forbes* v *Ameeroonissa Begam*[7]; *Shan Mukhun Lall* v. *Sreekishen Singh*[8]; *Googlee Sahoo* v. *Prerulall Sahoo*[9]; *Savitri* v. *Samji*[10]; *Khaderu Hoosein* v. *Emdad Hoosein*[11].

1. (1900) I. L. R. 22 A 366.
2. (1897) I. L. R. 21 M. 324.
3. (1199) I. L. R. 23 M. 494.
4. (1199) I. L. R. 23 M. 260.
5. (1859) 7 M. I. A. 283, 302.
6. (1865) 10 M. I. A. 413.
7. (1865) 10 M. I. A. 340.
8. (1868) 12 M. L. J. 157.
9. (1881) I. L. R. 7 C. 141.
10. (1889) I. L. R. 14 B. 232.
11. (1901) I. L. R. 29 C. 751 (F.B.)

Thimma Nayanim v. Venkata Charlu.

C. R. Tiruvenkata Chariar.—There must be an appeal on the merits. It is only as an adjunct to that that one can attack an interlocutory order. S. 591 is imperative. Any order for which an appeal is not provided by the C. P. C. is not appealable, and in the present case the appeal attacks only the interlocutory order. The cases quoted are all distinguishable, some on the ground that the appeals therein were also on the merits and others on the ground that they were before S. 491 was enacted.

The Court delivered the following

JUDGMENT :—We are of opinion that the appellant in the present case did appeal against the decree, within the meaning of S. 591 of the Code of Civil Procedure (Act XIV of 1882) though the only reason for the appeal was the erroneous decision in regard to the interlocutory order. But the terms of the section, in our opinion, allow such an appeal.

The decision of the Subordinate Judge as to the construction of S. 591 of the Code of Civil Procedure is, no doubt, in accordance with the decisions in *Sher Singh* v. *Diwar Singh*[1] and *Causannel* v. *Gomes*[2]. But the former is based on an *obiter dictum* in *Sher Singh* v. *Diwar Singh*[1] and the decision in *Causannel* v. *Gomes*[2] is doubted in *Godavari Samulu* v. *Gajapathi Narayana Deo*[3] wherein it is pointed out that it is doubtful if it can be reconciled with the earlier decision reported in *Sankaralinga Mudali* v. *Ruthnasabapathy Mudali.*[4] The decision in *Googlee Sahoo* v. *Prem Lall Sahoo*[5] and *Savitri* v. *Ramji*[6] are directly in favour of the appellant's contention, and they are, we think, in accordance with the language of the section and the principle on which it is based as explained by the Privy Council in *Maharajah Mohesur Singh* v. *The Bengal Government*[7]; "We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of

1. (1900) I. L. R. 22 A. 366.
2. (1899) I. L. R. 23 M. 260.
3. (1889) I. L. R. 23 M. 494.
4. (1897) I. L. R. 21 M. 324.
5. (1881) I. L. R. 7 C. 148.
6. (1889) I. L. R. 14 B. 232.
7. (1859) 7 M. I. A. 283 at p. 302.

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forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby, on the one hand, he might be harassed with endless expense and delay and, on the other, inflict upon his opponent similar calamities. We believe there have been very many cases before this tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication."

We, therefore, set aside the decree of the Subordinate Judge and remand the appeal to the District Judge for decision on the merits. Costs will abide the event.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Abdur Rahim.

Kondamodalu Linga Reddi, minor under the protection of the Court of Wards represented by the Collector of Madras .. Appellant* (*Defendant*)

v.

Alluru Sarvarayudu of Annadevarapeta. .. Respondent (*Appellant*).

Linga Reddi v. Sarvarayudu.

Limitation Act, S. 19—*Acknowledgment by Court of Wards or by the Collector as its Agent—Madras Court of Wards Regulation V of* 1804, *Ss.* 17, 32.

The Court of Wards, either by itself or through its agent, the Collector, has the power to make an acknowledgment of a debt so at to bind the ward, and give a new starting point for limitation; and Ss. 17 and 32 of Regulation V of 1804 do not restrict the power of the Collector to give an acknowledgment.

Appeal from the decree of the District Court of Godavari in O. S. No. 55 of 1903.

The Government Pleader (*C. F. Napier*) for appellant.

T. V. Seshagiri Aiyar for respondent.

* A. 183 of 1905. 15th April 1910.

Linga Redd v. Sarvarayudu.

C. F. Napier read S. 19 of the Limitation Act as to when one person can bind another by his acknowledging the debt of that other and argued that a guardian is a trustee and not an agent of the infant—*Ram Charan Das* v. *Gaya Prasad* [1]. If so, in such a case an acknowledgment by the guardian cannot be an acknowledgment by an *agent—Annappagauda* v. *Sangadiyappa*[2]. Unless, under the Court of Wards Act, the Court of Wards has powers given to it of acknowledging a debt, it cannot bind its wards by such acknowledgment. The Court of Wards is not the person liable for the debt—S. 27 of the Guardian and Wards Act. The Privy Council judgment in *Beti Maharani* v. *The Collector of Etawah* [3] turned upon the words in the N. W. P. Act The question here whether there are words in Act I of 1902 (Court of Wards Act) empowering the Court of Wards to acknowledge and whether it can delegate duty may be different. [*Rahim* J.—An agency may be created by statute.] Yes. I refer to *Kailasa Padayachi* v. *Ponnukkannu Achi*[4], *Sobhanadri Appa Rau* v. *Sriramulu*[5] and *Subramanya Aiyar* v. *Armuga Chetty*[6] for my position, and they are not based on agency. They deal with only the powers of a manager in a Hindu family—*vide* S. 17 of the Court of Wards Act. There is no suggestion in this case that the Court of Wards sanctioned the act of the Collector in acknowledging the debt. S. 19 of the Limitation Act speaks of 'suits' and 'the party' and 'person.' *Party* and *person* have reference to 'suit' in the beginning of the section. Then the question is whether the Court of Wards is a party or person. As to powers of the Court of Wards, S. 20 of the Court of Wards Act (I of 1902) deals only with 'superintendence'—S. 32: liquidation of debts payable by the *ward.* There is nothing in the Act to show that the property of the ward has vested in the Court of Wards. Section 34 (*d*) empowers a ward to dispose of his property by will. Sections 48-50 say that the suits are by and against the *ward.* [*Rahim* J.—Vide S. 53.] Under the old Court of Wards Act the section relating to suits was S. 23 of Regulation V of 1804. As the party or person acknowledging must be the person sued, under S. 19 of the Limitation Act, and since the

1. (1908) I. L. R. 30 A. 422, 433.
2. (1901) I. L. R. 26 B. 221, 281.
3. (1894) I. L. R. 17 A. 198. (P.C.)
4. (1894) I. L. R. 18 M. 456.
5. (1893) I. L. R. 17 M. 221.
6. (1902) I. L. R. 26 M. 330.

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Court of Wards that has acknowledged the debt is not to be deemed a party, S. 19 will not be of any avail—Ss. 226 and 227 of the Contract Act.

T. V. Seshagiri Aiyar:—The Collector has got powers under the Court of Wards Act to acknowledge a debt, whether he is called agent or not. As to the powers of the Collector and scope of the Act, *vide* the preamble of Regulation V of 1804—"to duly preserve the estate." It was under the Regulation that the acknowledgment was made. S. 12, Cl. 3, 14, 16; Cl. (4) (speaking of receipts and discharges by Collector); S. 17 (speaking of Collector *liquidating* debts even without the permission of the Court of Wards); Ss. 29, 30, 32. In the present case the Collector sent me a notice after getting the sanction of the Court of Wards to the effect that he 'allowed' my claim. This notice of 'allowance' is an acknowledgment of the justness of my claim. Of course a further sanction 'to pay' is necessary under S. 17—Standing Orders of the Board of Revenue, Ch. XX, Or. 214, rule 5, 1900 edition. After getting the confirmation of the Court of Wards to 'allow,' the Collector is empowered to liquidate. A power to '*liquidate*' means a power to pay or settle, and it will include a power to acknowledge—STORY on *Agency*, Art. 138. [The Collector empowered to liquidate is an agent for that purpose.] *Anderson* v. *Sanderson*[1]. BOWSTEAD on *Agency*, p. 354 (4th edition.) [It is not necessary that the agency should be express—BOWSTEAD on *Agency*, pp. 15 to 17; STORY on *Agency*, S. 45] *Burt* v. *Palmer*[2]; *Curmen* v. *Milburn*[3]. *Suryanarayana* v. *Narendra*[4] is a case of reviving a barred debt against the state. The Court of Wards Act is *substituted* for the disqualified proprietor. So the Court of Wards being the owner it can acknowledge. Cf. Ss. 5-A and 38, Cl (4). The Court of Wards can acknowledge a debt—*Beti Maharani* v. *The Collector of Etawah*[5] *Ram Charan Das* v. *Gaya Prasad*[6]. The Court of Wards has got larger powers than a natural guardian. A certificated guardian can acknowledge a debt—*Kamla Kuar* v. *Har Sahai*[7] *Jadu Lal Sahu* v. *Tanki Koer*[8] (a case of the right of pre-emption being exercised by the Court for the ward); *Surendra Nath Sarcar* v. *Rai*

1. (1817) 2 Starkie 204.
2. 5 Ex. 145.
3. (1889) 42 Ch. D. 424, 432.
4. (1895) I. L. R. 19 M. 265.
5. (1894) I.L.R. 17 A. 108.
6. (1908) I.L.R. 30 A. at 432.
7. (1888) A.W.N. 187.
8. (1908) I. L. R. 35 C. 575, 602.

Charan Haladhar[1] (a case of certificated guardian paying interest treated as agent for the purpose of S. 20 of the Limitation Act); MITRA on *Limitation*, p. 357. 4th edition ; *Annappaganda* v. *Sangadiyyappa*[2] an acknowledgment to save a minor's estate from a suit will be an act of benefit to the minor); *Bai Bhulli* v. *Nanalal Dayabhai*[3] *Sobhanadri Appa Rau* v. *Sriramulu*[4] *Duraisawmi Reddi* v. *Muthial Reddi*[5]. It is true that a manager in a joint Hindu family has no authority to revive a barred debt—*Chinnaya Nayudu* v. *Gurunatha Chetty*[6]. A manager is generally an agent for the purposes of S. 19 and 20—*Bhasker Satya Shet* v. *Vigo Lal*[7] *Dikkar* v. *Appaji*[8]. A guardian like the Court of Wards must have greater powers than ordinary guardians or certificated guardians or the manager of a joint Hindu family. There is nothing in the Court of Wards Act to limit the Court's powers. The Court of Wards has powers extensive with those of the proprietor for the purpose of preserving and managing the estate—*Kashi Shahton* v. *Maharajah Iswari Prasad Narain Deo*[9].

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The Court delivered the following

JUDGMENT:—The questions for determination in this appeal are whether in the case of an estate taken over by the Court of Wards certain acknowledgments made by the Collector as agent of the Court of Wards and by the Deputy Collector in respect of the debts due by the ward are acknowledgments of liability within the meaning of S. 19 of the Limitation Act so as to give rise to the computation of a new period of limitation from the time of the acknowledgments.

As regards the terms of the acknowledgments it was conceded (or at any rate not seriously contested) that if the acknowledgments had been given by the party originally liable they would have been sufficient.

It was contended, first, that the Court of Wards had no authority to make the acknowledgments so as to bind the ward, and, secondly, assuming they had, the Collector was not authorised to make them.

1. (1902) I. L. R. 29 C. 647.
2. (1901) I.L. R. 26 B. 221.
3. (1902) Bom. L.R. 812.
4. (1892) I L. R. 17 M. 221.
5. (1908) I. L. R. 31 M. 458.
6. (1882) I.L.R. 5 M. 169.
7. (1893) I.L.R. 17 B. 512.
8. (1895) I. L. R. 20 B. 155.
9. (1907) C.L.J. 727.

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For the purposes of the questions we have to decide, we do not think any distinction can be drawn (and we do not think Mr. Napier sought to draw any distinction) between the powers of the Collector and those of the Deputy Collector.

When the acknowledgments were made the Regulation V of 1804 as amended by Madras Act IV of 1899 was in operation.

The preamble to the Regulation recites the expediency of establishing efficient means for the due preservation of the property of incapacitated persons and the education of minors. Apparently the estate in the present case was taken over by the Court of Wards by reason of the minority of the heir to the estate. But it is quite clear, having regard to the general scope of the Act as amended in 1899, that the duties and obligations of the Court of Wards in such a case are not limited to the education of the minor and that they include the due preservation of the estate. Having regard to the preamble and the general scope of the Act as amended, we should certainly be prepared to hold, unless we were precluded from so doing by an express provision of law or by authority, that the Court of Wards has the power to make an acknowledgment of a debt which would bind the ward and give a new starting point for limitation. To hold otherwise might, as it seems to us, work grave injustice. The staving off of a suit may be necessary for the due preservation of an estate, and the creditor might hold his hand and refrain from exercising his right of presenting his claim in Court (see S. 32) relying on the action of the Court of Wards as preventing his suit being time-barred.

In *Beti Maharani* v. *The Collector of Etawah*[1], with reference to this question of acknowledgment, the Privy Council say in so many words: "It must be taken that the Court's act would bind the ward" (see p. 208.) (In that case the acknowledgment had been given by the Collector as agent of the Court of Wards.) In *Ram Charan Das* v. *Gaya Prasad*[2], *Banerjee* J. referred to a decision of the Allahabad High Court (*Kamla Kuar* v. *Har Sahai*[3]) to the effect that an acknowledgment by the Court of Wards gave a fresh starting point of limitation (page

1. (1894) I. L. R. 17 A 196. 2. (1908) I. L. R. 30 A. 422.
3. (1888) W. N. p. 187.

437.) In our opinion an acknowledgment given by the Court of Wards is binding on the ward.

We are also of opinion that an acknowledgment by the Collector as agent of the Court of Wards is equally binding. There is a general power of delegation given to the Court of Wards by S. 2 of the Regulation. "Where an agent is authorised to pay money for work done for his principal, or where he is referred to, to settle and adjust any account or business, his admissions of the existence of the debt and of its validity, will be sufficient to take the case out of the Statute of Limitation."—STORY on *Agency*, para. 138.

Section 32 of the Regulation V of 1804 no doubt requires the confirmation of the Court of Wards of any decision of the Collector as to the allowance of claims, whilst S. 17 requires the permission of the Court of Wards in writing for the payment of any private debt. But we do not think these provisions restrict the power of the Collector to give an acknowledgment which would save limitation—a power which, in our opinion, comes within the scope of authority as agent of the Court of Wards.

It has been argued that the use of the word 'liquidate' in S. 17 of the Regulation gives the Collector an express power to give an acknowledgment which would save the statute. We do not think any inference can be drawn from the word "liquidate." We think it is used as synonymous with "pay" though why the Legislature said 'liquidate' and not 'pay' is not obvious.

The present case is clearly distinguishable from the case of *Suryanarayana* v. *Narendra Thatraz*[1]. There the Collector promised to pay a barred debt; in other words, purported to make a new contract which could not possibly benefit the estate. In the present case we think it may fairly be assumed that the acknowledgments would not have been given by the Collector unless he thought it was in the interest of the estate that he should do so.

It has been held by this Court in *Sobhanadri Appa Rao* v. *Sriramulu*[2] and by a majority of the Full Bench in *Ram Charan Das* v. *Gaya Prasad*[3] (see too *Annapagauda* v. *Sangadiyyapa*[4])

1. (1895) I. L. R. 19 M. 255.
2. (1893) I. L. R. 17 M. 221.
3. (1908) I. L. R. 30 A. 422.
4. (1901) I L. R. 26 B. 221.

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that a guardian has authority to acknowledge a debt on the part of the minor, and we think the acknowledgment is equally good if given on behalf of a minor by the Court of Wards or by the Collector as agent of the Court.

The question whether a Collector as agent of the Court of Wards has authority to make an acknowledgment for the purposes of S. 19 of the Limitation Act came before the Privy Council in *Beti Maharani* v. *The Collector of Etawah*[1]. It was held on the facts that the debt in respect of which the acknowledgment had been given by the Collector was not identified with the debt sued on. But there is nothing in their Lordships' judgment to suggest that if the identity of the debts had been proved the acknowledgment of the Collector would not have been good.. (As we have pointed out, their Lordships say an acknowledgment by the Court of Wards themselves would be good). In fact the point does not seem to have been even argued by the eminent counsel who appeared for the Collector.

In this Privy Council case a doubt is expressed as to whether a 'Sarbarkar' or manager could be authorized to admit a fresh liability. We do not think it is necessary to consider this point because, as we understand from the judgment of the District Judge, the acknowledgment by the manager on which the appellant relies was confirmed by the Collector.

We think the District Judge was right and that this appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Abdur Rahim.

A. Santhalva .. .. .. Appellant*
v. (*Plaintiff*)
Manjanna Shetty .. .. Respondent
(*Defendant*).

Santhalva v. Manjanna Shetty.

Religious Endowments Act, S. 10—*Mandatory—Original committee of three—Death of one—Surviving two, powers of—Appointment of trustee by the surviving two—Validity—Corporation, analogy to.*

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* A. No. 65 of 1906. 21st February 1910.

1. (1894) I. L. R. 17 A. 198.

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Sections 7 and 10 of the Religious Endowments Act are mandatory : and where in a committee which originally consisted of three members, one died and the vacancy remained unfilled, *held* that the surviving two did not form a committee and consequently an appointment of a person as trustee by them (the remaining two) was not a valid appointment. *Narayana Aiyar* v. *Kuthalam Pillai*[1] distinguished.

Obiter :—The Committee shall not consist of less than the number originally appointed. Rules based on the analogy of the English law relating to corporations are not applicable to the case.

Appeal from the decree of the District Court of South Canara in O. S. No. 24 of 1906.

Suit for the recovery of a *Daivastan* (a demon-shrine), with the properties moveable and immoveable belonging to it, from the defendant who was managing the affairs of the temple for the four years previous to the suit. Plaintiff was a trustee appointed by the Committee under the Religious Endowments Act, under whose superintendence the plaint Daivastan came. The District Judge dismissed the suit, among other grounds, on the ground that the plaintiff's appointment was invalid as at the time the Committee was not of full strength, which was three. Plaintiff appealed.

P. R. Sundara Aiyar and *B. Sitaram Row* for appellant.

J. L. Rosario and *K. P. Madhava Row* for respondent.

P. R. Sundara Aiyar, for appellant, referred to Sections 7, 8, 9, 11 and 12 of the Religious Endowments Act and to *Ananta Narayana Aiyar* v *Kuthalam Pillai* [1] for the position that Committees were governed by rules which govern Corporations. In Corporations consisting of a definite number, the rule of English law is that the survivors can act so long as the majority remain—KYD on *Corporations,* Vol. i, p. 447 ; *The King* v. *Bellringer*[2] ; *The King* v. *Miller*[3] and the cases cited therein ; ADLER on *Corporations*, p. 52. As to the power of survivors to act—BACON'S *Abridgment*, Vol. ii, p. 285 ; TUDOR p. 319. Cited *ib.* and *Doe* v. *Goodwin*[4] for the position that the provision for filling up was only directory and not compulsory. For the analogous rule as to trustees, cited LEWIN on *Trusts*, p. 287 *et seq.* and cases cited therein ; TUDOR on *Charities*, p. 259; *Attorney-General* v. *Bishop of Lichfield*[5] ; *Warburton* v. *Sandys*[6]. As to offices *Deno Nath* v. *Ramkurna*[7] and FARWELL on *Powers*,

1. (1899) I. L. R. 22 M. 481.
2. (1792) 4 T. R. 810=100 E. R. 1135.
3. (1795) 6 T. R. 268, 10 E.R. 549.
4. (1822) 2 Dow. & Ry. 259.
5. (1801) 31 E. R. 878.
6. (1845) 60 E. R. 499.
7. (1904) 6 C.L.J. 527.

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p. 457. Submitted that any rule to the contrary is likely to lead to great inconvenience in practice. Under S. 10 of the Act the power of the Committee to fill up the vacancy ceases at the end of three months. After that the Court alone can act, but that only on the application of some person. What is to become of the multifarious duties of the Committee pending the proceedings to fill up vacancy if nobody should choose to set the Court in motion? S. 3 contemplates the Board of Revenue transferring certain properties to the Committee. What is to become of them? Referred to the provisions of the Act relating to Charity Commissioners in England; TUDOR, p. 507; RAWLINSON on *Municipal Corporations*, p. 22.

J. *L. Rosario*, for respondent, relied upon the wording of the section which made it clear that 3 is the minimum that could act. He also referred to the wording of S. 10 which makes it clear that it is not the Committee that fills up the vacancy but the remaining members of the Committee.

The Court delivered the following

JUDGMENT:—*The Chief Justice.*—The main question raised in this appeal is, no doubt, one of great importance, and, so far as we know, the question in this precise form has never come before the Courts for determination. But as we had the benefit of hearing the question fully argued by Mr. Sundara Aiyar, and as we have made up our minds with regard to it, we do not think any advantage is to be gained by further consideration of the point. The question is: Whether the appointment of a trustee of a temple which is made by two members of a Temple Committee appointed under S. 7 of the Act XX of 1863, there being only two members of the Committee at the time the appointment was made, who had, we may take it, purported to act as the Committee although, in fact, they were only two out of the three originally appointed—whether an appointment in such circumstances is good? The learned District Judge has held that it is not, and I think that he is right.

Section 7 of the Act of 1863 provides that "the Local Government," in certain circumstances, is once for all to appoint a Committee to exercise the powers of the Board of Revenue and the local Agents under the Regulations which were repealed by

the Act. The section goes on to enact that the Committee shall consist of three or more persons and, subject to an exception, shall perform all the duties imposed on the Board of Revenue and the local Agents.

S. 10 provides that whenever a vacancy occurs among the members of a Committee so appointed, a new member shall be elected to fill the vacancy by the persons interested. It enacts that the remaining members of the Committee shall, as soon as possible, give public notice of the vacancy and shall fix a day, which shall not be later than three months from the date of the vacancy, for the election of a new member by the persons interested. The section further provides that if a vacancy is not filled up by such election within three months after it has occurred, the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the Committee, and if the order be not complied with, the Civil Court may appoint a member to fill the said vacancy. The effect of these two provisions, therefore, is that the surviving members must act so that the date of the election shall be fixed not later than three months from the date of the vacancy. If they do not so act, their powers of election are gone, and then, unless the Civil Court takes proceedings on the application of somebody and appoints a person, there is no power to fill up the vacancy.

Now, the first point raised by Mr. Sundara Aiyar was this : The law required that the Original Committee appointed by the Local Government should consist of three members, and he did not contend that an appointment by the Local Government of a Committee which consisted of less than three members would be a good exercise of the powers given them by the Act or would be a good appointment of a Committee. But he argued, when once we have an original appointment of three by the Local Government, then the fact that a vacancy is not filled up in pursuance of the provisions of S. 10 does not incapacitate the surviving members from exercising the powers referred to in S. 7 of the Act. In other words, he contended that so long as the original appointment of the Committee consisted of three, the Committee consisting of two of the surviving members was a good Committee and could exercise the

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Chief Justice.

powers conferred by the Act. Now, the logical conclusion of that argument of course is, as Mr. Sundara Aiyar conceded, that a Committee which had been reduced in number to one would be a body capable of discharging the powers conferred by the Act, and that is a somewhat startling proposition. It seems to me the question whether provisions of this sort are obligatory and imperative or are merely directory must be determined with reference to the words of the particular enactment or the particular settlement in which they occur. Mr. Sundara Aiyar has contended that the provisions are directory. It seems to me, in construing the two sections of the Act together, that they must be read as imperative or obligatory.

Then Mr. Sundara Aiyar's second contention was, that in this case we have an original appointment of three which is good, and we have two surviving members and these two surviving members constitute the majority of the original three. He contended that inasmuch as, if there had been three members still forming the Committee, a quorum or a meeting of two could exercise the powers of the Committee, it followed that the two surviving members of the Committee, notwithstanding the fact that one is dead, could exercise the powers given to the Committee. I am not prepared to accept that contention. In support of it Mr. Sundara Aiyar referred to the principles of the law which governed the questions of the validity of the acts done by the members of a corporate body and he referred us to the case of *The King* v. *Bellringer*.[1] In that case it was held that "where a charter required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect, and the common council was a definite body, consisting of 36, that a majority of the whole number must meet to form an elective assembly, and that if the corporation be so reduced that so many do not remain, no election can be had at all." All that was decided in that case was that in the case of a corporate body where the number of the corporators is so reduced that, having regard to the original number a majority is not available, the corporation cannot act as a corporate body. Mr. Sundara Aiyar's proposition is the converse proposition that so long as there is a

1. (1792) 4 T. R. 810=100 E.R. p. 135.

sufficient number of the corporators to form a majority of the corporators having regard to the original number of the corporators, then the surviving members can act as a corporate body, and he says that for the purpose of determining the question raised in this appeal we must apply that principle to this case. He referred us to an observation made by the learned Judges who decided the case of *Ananta Narayana Ayyar* v. *Kuthalam Pillai* [1]. That was a case which arose under the Act now in question and the observation is as follows :—"Though the committees constituted under the Act are not strictly corporations, there can be no doubt that, with reference to the matter in hand, such committees ought to be looked upon in the light of, and be governed by the rules applicable to, regular corporations." It is a guarded observation, and it was made with reference to the matter in hand. Now what was the matter in hand? In that case a committee had been validly constituted under the Act of 1863 consisting of seven. A meeting was held, the committee, at the time the meeting was held, being a full and complete committee. At the meeting five were present, and a resolution was unanimously passed that at future meetings three should form a quorum. A future meeting of the committee, of which due notice had been given to all the members of the committee, was held, and at that meeting three members of the committee attended and those three members duly passed a resolution, and that resolution was held by the Court in the case in *Ananta Narayana Ayyar* v. *Kuthalam Pillai* [1] as binding on the committee. That was all that was decided in that case. It seems that there the learned Judges were dealing with a question of procedure and what they meant to lay down was that on questions of procedure, the statutory committee appointed under the Act of 1863 must be deemed to have the same powers as a corporate body. I do not think the learned Judges intended to go beyond that. I certainly cannot accede to the suggestion that the law governing corporate bodies with regard to the capacity of the members of the corporate bodies to act which is laid down, amongst other places, in a passage in BACON'S *Abridgment*, Vol. ii, p. 285, to which Mr. Sundara Aiyar referred, is applicable to the case of the statutory body appointed under

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1. (1899) I. L. R. 22 M. 481.

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bdur Rahim J.

the Act of 1863. With regard to this question I think the District Judge's decision is correct, and I would dismiss this appeal with costs. It is not necessary for us to consider the other points raised in the appeal.

Abdur Rahim J :—I quite agree in the judgment proposed by the learned Chief Justice But as the question is one of importance and is not covered by any decision to which we have been referred, I think I ought to state my reasons.

It seems to me that, reading Ss. 7 and 10 of the Religious Endowments Act together, there can be very little doubt that the Legislature requires that the Committee which is vested with the power formerly exercised by the Board of Revenue should consist of the same number as were originally appointed by the Local Government. The Government, it is conceded, cannot appoint a Committee consisting of less than three members That, I take it, is clear from S 7. Then S. 10 says that whenever there is a vacancy in the Committee, it is to be filled by an appointment made by the remaining members of the Committee who are to take steps for this purpose within three months of the occurrence of the vacancy. If they fail to take such steps, the Civil Court is then empowered to make the appointment or to direct the Committee to make the appointment, There cannot, thus, be any doubt that the Legislature contemplated that the original number of members must exist for the purpose of exercising the powers of the Committee under the Act.

Great stress has been laid by Mr. Sundara Aiyar on the inconvenience that might be caused in the management of institutions if the surviving members of the Committee be held to be incompetent to act as the Committee during the pendency of the appointment. Supposing there would be some inconvenience; that, in itself, would not justify us in placing an interpretation upon the enacting provisions of the Act other than what is called for by their plain language. But it may be said that the Committee are merely a supervising authority and as there is always to be a rustee or Manager or Superintendent to carry on the business of the institution, the inconvenience caused, if any, would not be considerable. The fact that the remaining members of the Committee are required to act with promptitude, while it shows that the Legislature was alive to the possibility of

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inconvenience arising in the interval, also indicates the intention of the Legislature to be that the Committee shall not consist of less than the number originally appointed. We have been referred to the English rule relating to corporations. But it appears to me that, so far as the present question is concerned, we cannot derive much help from the analogy of corporations. The rule that has been referred to is that if the number of corporators does not fall below the majority of the original number of corporators, the corporation exists, and can exercise the powers conferred on it by its charter. Reliance has also been placed on the case in *Ananta Narayana Ayyar* v. *Kuthalam Pillai*[1] where it was decided that a quorum of three members fixed by a resolution of the Committee can exercise the powers of the Committee. This decision relates to a mere rule of procedure or the mode in which the Committee, supposing it is constituted as required by the law, is to transact its business, but here the question is whether two members of a Committee which originally consisted of three members—the least number required by law—but the vacancy in which has not been filled, can validy exercise the powers of the Committee. The two remaining members, as I read Act XX of 1863, cannot be said to be the Committee at all, and the appointment by them of the plaintiff as *Moktessor* or trustee must, therefore, be held to be invalid. The suit has been rightly dismissed, and I agree that the appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir. Arnold White, *Kt.*, Chief Justice, and Mr. Justice Krishnaswami Aiyar.

Karnam Venkatakrishna Pillai .. Appellant* (*Plaintiff*)

v.

Appana Muthialu Reddy & another .. Respondents (*1st Deft's L.R. and 2nd Deft.*).

Limitation Act, Art. 110—"*Arrears of rent*", *meaning* of—*Civil litigation pending —Attachment for more than the amount actually due.*

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1. (1899) I. L. R. 22 M. 481.

* S A. No. 759 of 1908. 6th April 1910.

Venkata-krishna Pillai v. Muthialu Reddy.

So long as proceedings are pending before Civil Courts, the rate of rent is in suspense and therefore no arrears can be said to have been due within the meaning of the Limitation Act.

An attachment for an amount larger than what is due is valid for the amount actually due, though in the case of sale it may be totally bad.

Second appeal from the decree of the Court of the District Judge of North Arcot in A. S. No. 625 of 1907, presented against the decision of the Court of the Head Assistant Collector of North Arcot, Ranipet Division, in S. S. No. 106 of 1907.

T. Venkatasubba Aiyar and *T. Narayana Sastri* for appellant.

L. A. Govindaraghava Aiyar for respondent.

The Court delivered the following

JUDGMENT:—In this case the tenant did not accept the Patta tendered and the landholder therefore was entitled to proceed by summary suit before the Collector to enforce acceptance of the Patta, and in such a suit it is for the Collector to settle the terms of the tenancy.

It has been decided by the Judicial Committee that so long as proceedings are pending before the Collector and on appeal from him before the Civil Courts, the rate of rent is in suspense and therefore no arrears of rent can be said to have been due within the meaning of the Limitation Act. This conclusion is based upon a consideration of the sections of the Rent Recovery Act. For the same reasons we hold the rent became due under S. 2 of the Rent Recovery Act for purposes of proceedings under the Act when the rate of rent was ascertained by the final decision of the Civil Court. There is, therefore, no bar under that section.

It is argued that the attachment is bad as it was for a larger amount than what the District Judge held to be due. It has been held by this Court in recent cases that the attachment is good for the amount actually due. A case of sale stands on a different footing from a case of attachment. The case before us is only one of distraint, not of sale.

The second appeal is dismissed with costs.

B

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Kandukuri Mahalakshmamma Garu, Proprietrix of Urlam and others .. Appellants* *in A. No.* 66 *of* 1905 (*Plff.* & *her Legal Reptves.*)

v.

The Secretary of State for India represented by the Collector of Ganjam .. Respondent (*Defendant*).

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Grant - Construction— Waters - Right of irrigation—Stream, meaning of—Ownership in bed of stream—Madras Acts, VII of 1865 *and III of* 1905 - *Presumption - Contract Act, S.* 69—*Voluntary payment—Payment of water-cess, on demand - Not voluntary payment.*

The non-reservation of river beds in a grant of a Zemindari by Government does not justify any presumption more than that the Government fixed the revenue with reference to the extent of land under irrigation at the time of the grant.

Where the origin of title is known to the contrary the fact that irrigation has been permitted free of charge for a series of years cannot justify a presumption of a grant of irrigation rights, even though it may be evidence of a lost grant if the origin of title were not known.

An arrangement for the upkeep of the channels by the parties interested does not necessarily lead to any inference as to the supply of water free of charge.

By reason of S. 2 of Madras Act, III of 1905, all standing and flowing waters not belonging to any one else are the property of the Government, subject to easements and natural rights of other landholders; and the body of water forming the river belongs to the Government within the meaning of Madras Act, VII of 1865, even though the bed may be vested in the owners of land along the banks, so as to give them the right to accretions or 'lankas, forming therein.'

A stream is a body of water having as such body a continuous flow in one direction.

The onus is on the Zemindar to prove the extent of his right to irrigation with Government water free of charge.

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*A. Nos. 66 of 1905 ; 64, 65. 125, 134 of 107 ; & 35, 36, 40, 41 of 1905, S.A. No. 237 1907. 9th September 1910.

** I

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As regards the extension of irrigation in Jerayati land, *i.e.*, the conversion of 'dry land into wet' the only engagement on which a Zemindar can rely is an engagement enabling him to irrigate free of separate charge the extent of land which was classed as "wet" at the time of the Permanent Settlement. As regards inams, if the assessment was fixed with reference to the capacity of the land to grow an irrigated second crop, the Government cannot demand a second payment when the second crops are grown.

A demand by the Government having at its back the powers given by Act II of 1864, must ordinarily amount to a threat of distraint if the money demanded is not paid, and consequently, if payment is made to prevent the execution of that threat, the payment cannot be regarded as voluntary payment within the meaning of S. 69 of the Contract Act.

Appeals from the decrees of the District Court of Ganjam in O. S. No. 319 of 1905, 30 of 1906, 37 of 1903, 38 of 1903 and of 1904.

Second Appeal from the decree of the District Court of Ganjam in A. S. No. 161 of 1906 presented against the decree of the Court of the District Munsif of Chicacole in O.S. No. 306 of 1905.

A. No. 66 of 1905, A. No. 64 of 1907 with the Memorandum of Objections filed by the respondent, and A. Nos. 129, 65 and 134 of 1907 were heard from the 6th to the 14th December 1909, and A Nos. 35, 36, 40 and 41 of 1905 and No. 237 of 1907 were heard on the 14th December 1909, and the cases having stood over for consideration till the 15th February 1910 were again spoken to on 9th September 1910.

The main contention in all these suits was as to the right of the Government to impose water-cess, in some cases for water taken for second crop and in others for irrigating dry lands; in some cases the proprietor being the Zemindar of Urlam to whom permanent Sannad was issued in respect of the lands in 1803, and in others the proprietors being the Inamdars to whom Inam title deeds were issued at various times. The contentions of all the proprietors were—(1) that the Government by the terms of the Sannad and the Inam title deeds had engaged with them not to levy water cess for the improvements and extensions in cultivation now sought to be charged with water-cess ; (2) that the streams, their beds and their water, which irrigate the several lands, belonged to the proprietors and not to the Government, and

(3) that even if they did not so belong, the Zemindar and the Inamdars had by long enjoyment acquired a prescriptive right to use the water without any liability to pay water-cess. The Government, which having collected the water-cess was the defendant in all the cases, contested each of the above contentions and contended that the payments of cess were voluntary and could not be recovered. The other contentions, the findings of the Lower Court and the facts peculiar to each case appear sufficiently from the arguments and from the judgment.

P. R. Srinivasa Aiyangar and *T. R. Ramachandra Aiyar* for appellant (plaintiff).

P. R. Sundara Aiyar with *A. Krishnaswami Aiyar* and *M. V. Krishnaswami Aiyar* for respondent (Government—defendant).

T. R. Ramachandra Aiyar :—Ex. *H*, the deed of permanent settlement dated 29th July 1803, says that the assessment is not to be increased even in case of improvement or extension of cultivation. Second crop will be improvement, and conversion of dry land into wet will be extension of cultivation—*vide* Fifth Report, 2nd Volume, pp. 317, 324, as to the instructions issued prior to the permanent settlement of these lands which are called Havelly lands. See at pp. 324 and 331 where the instruction is to allow the Zemindars to improve even their waste lands. It says that it is the wish of the Government to leave the entire care and control of tanks and water-courses to the Zemindars, except where it is absolutely necessary for the Government to keep them within their management. The Report says that in order to secure the full permanent assessment the Zemindar is to be allowed to cultivate all his lands and improve them in every way possible. The correspondence between the parties was next referred to. The Vakil then went into the evidence to show that the Zemindar was owner of the channels by showing his control over and expenditure on account of these channels to the knowledge of the Government. He said that the documents also showed that the Government conveyed these properties with all rights to use the water for all purposes. The Water Cess Act would apply only if the water is of a stream belonging to Government or

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constructed by Government. Government is only joint owner of these channels. For nearly a century no water cess was levied.

There is no evidence that the channels are artificial. Before the revenue sales in 1810 the existence of the channels was asked to be taken into account and brought to the notice of the purchasers—pp. 333, 331 of Fifth Report. ANGELL on *Watercourses*, at p. 10, also shows that grant of land includes grant of streams; p. 12, S. 9, shows that if Government had reserved to itself the right to these streams it must be expressed or clearly implied; p. 15, Note 1, of ANGELL, shows that an owner of land on both sides of a river owns the river; p.93, S.92, shows that parcels granted convey water rights. See p. 352, S. 206, for there being no differnce in this respect between artificial and natural streams except by special custom; see also p. 265, S. 149. Grants are to be construed favourably to the grantee.—FARNHAM on *Waters*, Vol. III, p. 2,187. Water is part of the estate and, unless expressly reserved, passes to the grantee; use does not create right, disuse cannot destroy the right—pp. 2,428, 2,436. Where no one can tell when the stream was dug it must be presumed to be *natural* throughout—p. 2,444, S. 831, p. 2,532. GOULD on *Waters*, p. 444, goes to show that long use of artificial streams may make them equal to natural ones. Owners of respective lots are entitled to repair within their limits—KINNEY on *Irrigation*, pp. 462, 463; *The Secretary of State* v. *Perumal Pillai* [1] (no reservation in grant and so unlimited irrigation). See *Rameshwar Pershad* v. *Kunj Behari Pattuk* [2] (for rights in natural and artificial channels, case reviewing English cases); *Bailey & Co.* v. *Clark, Son & Morland* [3] (entitled to reasonable user); *Whitmore* v. *Stanford* [4] (channel passing through various estates; notorious and continuous user for over 200 years; reasonable user, presumption as to property in bed); *Mary Lord* v. *The Commissioners for the City of Sydney* [5] (no reservation in grant, reservation in 2nd grant; right to bed *ad medium filum*, vide p. 498 for observation as to infant colony);

1. (1900) I.L.R. 24 M 279. 2 (1878) I. L. R. 4 C. 633 (P. C.)
3. (1902) I Ch. 619.
5. (1859) 14 E. R. 991, 12 M. P. C. 473.

Sutcliffe v. *Booth*[1] (artificial and natural water courses; artificial by origin becoming natural by user). See *Roberts* v. *Richard*[2] (for the position that as no one could tell when the stream was dug it must be held to be natural and different people enjoying the same having riparian rights); American Decisions, Vol. 49, p. 525 (easement of vendor). *Maharani Raj Roop Koer* v. *Syed Abdul Hossain*[3] shows that easement can be acquired independently of statute, and legal origin either by grant or engagement can be presumed; *Madhub Dass Bairaghi* v. *Jogesh Chunder Sarkar*[4] (long user, presumption of legal origin); *Ponnusami Tevar* v. *Collector of Madura*[5] (long user and presumption of grant); *Narasimha Sastrial* v. *The Secretary of State*[6] (reasonable user and riparian right.) *Srinivasa Rau Sahib* v. *The Secretary of State for India*[7] (easement independent of statute). *Watts* v. *Kelson*[8]; *Morgon* v. *Hirley*[9] (no express words necessary to create a right.) *Lutchmee Dass* v. *Secretary of State for India*[10] shows when 2nd crop was taken into account at the time of settlement no cess can be levied. See also *Chidambara Row* v. *Secretary of State for India*[11].

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P. R. Sundara Aiyar :—The matter is governed by Madras Act VII of 1865 which applies to all lands, Zemindari and Ryotwari. Beds of rivers, canals and water courses, and running water, are *declared* by Act III of 1905 to be the property of the Government and it does not create the property in the Government for the first time. The effect of Madras Act III of 1905 is that plaintiff must show that the water is his and its ownership passed to him. Permanent assessment only relieves the Zemindar from additional new land tax but not from water tax which must be paid whenever water is used. Plaintiff must prove *engagement* with the Government and it cannot avail him to prove easement or riparian rights. In 1865 Government was empowered to levy water cess in certain cases mentioned in Madras Act VII of 1865; cf. Road Cess which Zemindars also are obliged to pay in addition to land tax. Both as regards natural and artificial waters

1. (1863) 32 L. J. 136.
2. (1881) 50 L. J, Ch. 297.
3. (1880) I. L. R. 6 C. 394 (P.C.)
4. (1903) I. L. R. 30 C. 281.
5. (1869) 5 M. H. C. R. 6.
6. (1891) 1 M. L. J. 167.
7. (1882) I. L. R. 5 M. 226.
8. (1871) 6 Ch. Ap. Cas. 166.
9. (1878) I. L. R. 2 M. 46.
10. (1909) 19 M. L. J. 470.
11. (1902) I. L. R. 26 M. 66.

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there is no presumption that Government makes a grant of the bed of the stream. As to Ryotwari lands there is no presumption. Then how could there be a presumption in favour of Zemindari tracts? As the Havelli lands were granted to different persons, are we to presume partial grants in favour of each? The only thing that the grantee is entitled to is to irrigate the lands as they were irrigated before. Repairs and construction by the grantee can have no bearing unless these acts are taken to amount to an intention to grant all waters then flowing. In Ryotwari tracts the Government bears the larger share of cost; ryots bear some share. In Zemindaris the Government is guided by mamool. The fact that the cost of improvements is borne by the people benefited does not import larger grant. The right to flow of water does not import immunity from water cess; nor does the fact that private parties come to certain arrangements *inter se* as to repairs affect the right of Government to levy cess. The Judge has held these channels to be artificial. There can be no riparian rights in artificial channels (but only easements which may, however, resemble riparian right) whether Zemindari or Ryotwari tracts. Riparian rights can exist only when there are two owners. Section 13 of the Easement Act says that only such easements as were enjoyed at the time of grant will pass. Even if the plaintiff enjoyed these rights before Act VII of 1865 that would not divest the Government of the right to collect cess—see S. 2, Exception, of Madras Act III of 1905.

According to English law

(1) Bed of non-navigable rivers belongs to riparian owners; but they are not owners of water.

(2) If rivers be navigable and tidal, bed belongs to State.

(3) If navigable but not tidal, right is doubtful, but the sounder view is that it is Government's.

Riparian owners as owners of land are only entitled to the use of water for riparian purposes and for non-riparian lands if they do not diminish the water substantially: GALE on *Easements* (7th Edn). p. 214 Note (*d*). In India it is doubtful if this applies in its entirety. It would apply subject to Government's absolute control over distribution. The Government may supply the owner with other water—*Fischer* v.

Secretary of State for India[1] at p. 154: ("broad question if in India Government has power of collection, distribution") etc., p. 155. (Government have undertaken duty of irrigation in India)—p. 160; Ryotwari holders are equal to Zemindars in this respect. The paramount right of Government is independent of ownership of bed. Permanent Settlement does not vest the ownership of the estates in the Zemindars so that Government cannot interfere. Even if it is, bed of the channel has not been conveyed. Even if bed has been conveyed, it cannot be presumed that Government which is under obligation to other owners would have conveyed the water—Mr. Forbes's Introduction to the Estates Land Bill, *Fort St. George Gazette*, p. 370, of 9th May 1905. There is no express grant of the water in the Permanent Sannad. Can it be presumed? *Vide* S. 2 of Report 25 of 1802; Fifth Report, p. 321; S. 13-15, p. 322. S. 17. Water-cess the landlord must pay if he uses water: p. 331, S. 59. Care of water-courses would originally be in the holder. Evidence in this case shows that Government retained control of the channel. There is no promise to supply water except upon payment. Whatever might have been the instruction in the Fifth Report as to allowing free flow of water for cultivation, the question is whether water was *granted.* Sannad contains no mention of channels, but only tanks are mentioned. Plaintiff has not filed any schedules to his sannad. The schedules would show what the assessment was calculated upon and what actually passed. Circuit Committee did not take into account beds of channels in calculating *Jumma*. What a grant of land would pass in (*a*) natural streams, and (*b*) in artificial streams. In England if land by the side of non-navigaable stream was conveyed the presumption is that the bed is conveyed, but otherwise if the land be by the side of natural streams.—FARNHAM, Vol. 1, p. 218. *Duke of Devonshire* v. *Pattinson*[2] shows it to be a rebuttable presumption. Circumstances in one case are stronger. In this case we must, before we infer a grant of water, look to the following—(1) possible duty to supply water to various holders; (2) each stream flowed through several estates; (3) Government's future necessity to make change in beds; (4) six Inam villages still held directly under Government (5) Government maintaining control of the channels in its own hands. *Ambalavana Pandara Sannidhi* v.

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1. (1908) I.L.R. 32 M. 141, 154, 155, 160. 2. (1887) 20 Q. B. D. 263

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The Secretary of State for India[1] is not a case of water cess—channel passed through several villages. Customary labour (Act I of 1858) is no evidence of co-ownership, or ownership. *Kristna Ayyan* v. *VenkatachalaMudali*[2]: is a case of ryotwari land ; same principle applicable to Inamdars ; *Fischers case*[3] ; *Sankara Vadivelu* v. *Secretary of State*[4]. *Madras Railway Coy.* v. *Zemindar of Karvetnagaram*[5] states that Government is under a duty to maintain even tanks ; *Maria Susai Mudaliar* v. *The Secretary of State for India*[6]. According to English law Government would not be owner of water. But here Government is owner of water, which it could not be by merely owning the bed. According to Common Law the Government has a right in all natural streams. Principle of Act III of 1905 underlies Act VII of 1865 ; as to the retrospective character of certain Acts see *Attorney-General* v. *Marquis of Hertford*[7] See Craie's Statute Law, p. 59; Maxwell p. 333, as to retrospective effect of Acts declaratory of rights like Act VII of 1865 ; *Farnham*, Vol. II, S. 421. Conduct of Government subsequent to the grant must be taken into account to show what was the true construction of the grant. *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*[8] is the leading authority in England, India and America. Right over artificial channels is different in nature and quality though the measure may be the same as riparian right—*Taylor* v. *Corporation of St. Helens*[9]. See per *Jessel* M. R. at p. 271. Grant of water course may mean (*a*) easement, (*b*) right to running of water, and (*c*) right to land on which water passes. Easements Act S. 13, Cl. (*b*) & (*d*) "as it was enjoyed at the time of transfer;" *Farnham* Vol. III, pp. 2305 and 2307. Right to water in artificial channels will be the same as at the time of grant. In some cases the measure of right is said to be the same as riparian right—*Bailey & Co.* v. *Clark, Son & Morland*[10] ; *Watts* v. *Kelson*[11] ; has no bearing. In *Maria Susai Mudaliar* v. *The Secretary of State*[6] this case is interpreted. *Sutcliffe* v. *Booth*[12];

1. (1905) I. L. R. 28 M. 539.
2. (1872) 7 M. H. C. R. 60.
3. (1908) I. L. R. 32 M 154; 156.
4. (1904) I. L. R. 28 M 72, 79.
5. (1874) 1 I. A. 366, 385.
6. (1904) 14 M. L. J. 350, 353.
7. (1849) 3 Exch Rep. 670.
8. (1878) I. L. R. 4 C. 633 (P.C.)
9. (1877) 6 Ch. D. 264, 271.
10. (1902) 1 Ch. 649.
11. (1871) 6 Ch. A. 166.
12. (1863) 32 L. J. Q. B. 136.

COULSON on *Waters*, p. 108; FARNHAM, p. 2236: So much easement as was enjoyed alone will pass; *Birmingham, Dudley and Dudley Dt. Banking Coy.* v. *Ross*[1]. *Lutchmee Doss* v. *Secretary of State for India*[2] shows the general principle. *Secretary of State for India* v. *Perumal Pillai*[3] *and Chidambara Row* v. *Secretary of State*[4] contain the same principle as in *Lutchmee Doss* v. *Secretary of State for India*[2].

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A navigable river need not be continuously capable of carrying merchandise—Bombay Act V of 1879, S. 37: Act VIII of 1873, Preamble. People may have to repair and yet must pay for the water. Water of natural streams belongs to Government—LONG on *Irrigation*, S. 120. The Easements Act has saved the right of Government to collect and distribute water, a right which is inconsistent with existence of private rights. Bengal Regulation II of 1825, S. 4, Cl. 304. Tidality is not necessary—*Nogender Chunder Ghose* v. *Mahomed Esof*[5]; *Massumat Iram Bandi* v. *Hurgovind Ghose*[6]; *Felix Lopes* v. *Muddun Mohun Thakoor*[7]; *Deo dem Seebkristo* v. *The East India Company*[8]; DAS on *Riparian Rights*, p. 109; Indian law p. 103; French view p. 108. See *Secretary of State for India* v. *Kadirikutti*[9] on the assumption that English law applies. In America tidality is not necessary. ANGELL p. 713, S. 549; Hunter p. 313. What is navigable? GOULD, Ss. 108-110 (at recurring periods useful as highway for merchandise); ANGELL p. 695, S. 537, sufficient if to float boats or logs though only at certain seasons. American Cyclo paedia, Vol. 29, p. 292, need not be perennially so—DAS on *Riparian Rights*, p. 104, 108 p. 110 for passage of boats —*Chunder Jabat Ram Churn Mookerjee*[10]. No riparian rights as against Government can exist. They can exist only between proprietors *inter se*.-*Kalu Khabir* v. *Jan Meah*[11]; *Belbhadai Pershad Singh* v. *Sheikh Barkat Ali*[12]; *Kristna Ayyan* v. *Venkatachala Mudali*[13], and *Peranai-Dam case*[14].

1. (1888) 38 Ch. D. 314.
2. (1909) 19 M. L. J. 470.
3. (1900) I.L.R. 24 M. 279.
4. (1902) L. R. R. 26 M. 66.
5. (1872) 10 B. L. R. 406, 431.
6. (1848) 4 M. I. A. 403.
7. (1870) 13 M. I. A. 467.
8. (1856) 6 M. I. A. 267.
9. (1890) I L. R. 13 M. 369, 376.
10. (1871) 15 W. R. 212.
11. (1901) I. L. R. 29 C. 100.
12. (1906) 11 C. W. N. 85.
13. (1872) 7 M. H. C. R. 60.
14. (1908) I. L. R. 32 M. 152, 164.

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T. R. Ramachandra Ayyar in reply:—The English law must be followed—*Secretary of State* v. *Kadirikutti.*[1] Tidality is taken for granted—DAS p. 109, p. 104; French law, p. 108; American law, p. 109. Bengal Regulation requires navigability at all times of the year. COULSON pp. 65-68. 'Navigable' means navigable at all times of the year—vide *Chundra Jabat* v. *Ram Churn Mookerjee,*[2] p. 215; FARNHAM, Vol. I, p. 239; *Pullamapally Sankaran Nambudri* v. *Vittil Thalakat Muhamad.*[3] Government have recognised riparian rights in Vamsadhara river. *Waterpark* v. *Fennel*[4] shows that subsequent enjoyment may be looked into for determining the extent of grant—*Mary Lord* v. *The Commissioners for the City of Sydney*[5]; *Maria Susai Mudaliar* v. *Secretary of State*[6]; FARNHAM, Vol. III, p. 2,430. Riparian rights may attach to an artificial stream.

P. R. Sundara Aiyar.—On the question whether payment was voluntary or not: Payment of revenue when no attachment is made is voluntary and cannot be recovered. The fact that it was paid after protest does not matter—*Ellis* v. *Banbury Rural District Council.*[7] Similarly *Muttayya Chetti* v. *Secretary of State for India.*[8] I distinguish *Lutchmee Doss* v. *Secretary of State*[9] on the facts of that case.

T. R. Ramachandra Aiyar.—I rely on *Lutchmee Doss* v. *Secretary of State for India.*[9] Protest is sufficient and no coercion is necessary to make the payment involuntary.

The Court delivered the following

JUDGMENTS.—*Miller* J.:—The questions for decision in all these appeals except Appeal No. 41 of 1905, which is for costs only, relate to the right claimed by the Government to charge a water cess under Act VII of 1865 (Madras) on lands in the Urlam Zemindari and Lukulam Agraharam in the Chicacole Taluk of the Ganjam District, irrigated from four channels, the Jalmuru, Polaki, Lukulam and Mobagam channels, all of which take off from the left bank of the river Vamsadhara.

The cess objected to by the Zemindar and Agraharamdars has been levied in some cases on irrigated second crop grown on

1. (1890) I. L. R. 13 M. 363.
2. (1871) 15 W. R. 212, 215.
3. (1905) I. L. R. 28 M. 505.
4. (1854) 11 E. R. 254.
5. (1854) 14 E.R. 441.
6. (1904) 14 M. L. J. 350.
7. (1899) 84 L. T. p. 224.
8. (1898) I.L.R. 22 M. 400.
9. (1909) 19 M. L. J. 470.

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land classed as 'dry' or unirrigated land. The Zemindar and the Agraharamdars claim the right to irrigate free of cess all the land 'dry' or 'wet' which the channels will command, and as many crops as can be raised thereon.

The Government wil be entitled under the Act of 1865 to charge water cess if the water with which the lands are irrigated is supplied from a river or channel belonging to, or a work constructed by, the Government, and if there is no engagement between the person using the water and the Government by which the irrigation is to be free of separate charge.

All the lands commanded by the four channels in question were included in the Havelli lands, which came into the hands of the East India Company in 1765. In 1803 they were divided into four lots and were all disposed of by permanent settlement with the bidder offering the highest "premium" at an auction. Of the four lots three were soon afterwards, in 1809 and 1810, sold up for arrears of revenue, and two of them, Jalmuru and Nagarakatakam, were bought by the Government: the third, Urlam, was purchased by a predecessor of the present Zemindar. The fourth lot, Polaki, did not come into the hands of the Government until 1850. The District Judge finds that the Jalmuru, Polaki and Lukulam channels are channels belonging to the Government and, therefore, that water cess may be charged upon land irrigated under them, but that the Mobagam channel does not belong to the Government and the Vamsadhara river which supplies it does not belong to Government, and consequently that no charge can be made for water supplied from that channel.

Both sides have appealed against these decrees in so far as they injuriously affect the rights they claim.

The Zemindar claims to be owner of all the channels so far as they lie within the limits of the Urlam Estate, and though the answer to the question, who is the owner of the channel beds, may not materially affect the decision of these appeals, I have thought it best to deal with the question as it has been fully argued. The Zemindar has at different times made inconsistent allegations concerning the origin of the channels, at one time alleging that they are natural branches of the Vamsadhara river and at another that they were dug by previous Zemindars. It is clear that the latter allegation cannot be accurate, for it

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is shown by Exhibit LIV that all four channels were in existence before 1792, that is to say, before the Havelli lands were settled as Zemindari land. Nor is there any evidence to support the former suggestion. What evidence there is—there is not much—points the other way. In 1854 Captain Rundall writes of the channels as old native works excavated with a great fall in their beds and gradually enlarged by the action of the unregulated volume of the water passing along them (Ganjam District Manual, page 253). Exhibits G (1826), C (1854) and E (1889) shew that some of the channels have always been regarded as artificial, and I think it must be taken, in this state of the evidence, that all are artificial channels. At the date of the auction in 1803 they watered Havelli lands and certain inams, but when the Havelli lands were permanently settled the right to collect the dues payable by the inamdars was also alienated to the Zemindars. Thus it may be said that the only lands watered by the channels after the permanent settlement were Zemindari lands.

Now it is contended on behalf of the Government that when the Havelli lands were divided into lots and transferred to Zemindars the channels were reserved in the hands of the Government, and on behalf of the Zemindar that they were alienated with the lands.

There is nothing in the 'Sanad,' granted to the Zemindar at the permanent settlement, which helps to elucidate the matter. No mention is therein made of channels or water courses. In the instructions to Collectors issued in 1799 which form an appendix to the well known "5th Report from the Select Committee on the affairs of the East India Company" it is stated to have been the intention of the Company to leave the construction and care of the water courses entirely to the Zemindars unless it should be thought that the works were such as, for special reasons to be stated by the Collector, ought to be retained under the care of the Government (5th Report, Volume II, Page 331, paragraph 59). We have not been shewn anything in the evidence to indicate that any channels or works in the Havelli lands were so reserved, nor does it seem probable that the Government would at that time have deemed it necessary to reserve a channel merely because it watered the lands of more than one Zemindar. The

Zemindars could settle the distribution of the water according to custom or by arrangement. *Ambalavana Pandara Sannathi* v. *Secretary of State for India*,[1] a case relied on by the Government, is distinguishable, for there the channel in question irrigated lands other than inam lands, and it was held unlikely that in that case the grant of the inam carried with it the grant of the channel.

And, so far as appears from the evidence, the Government did not, until some of the property came back into its own hands, exercise any control over, or in any way interfere with, any of the channels. The Jalmuru and Nagarakatakam estates quickly returned to the ownership of the Government, but Polaki remained a Zemindari until 1850, and beyond the authorisation of the removal of the head of the Polaki channel to a point on the bank of the river within a Government village, there is nothing to shew that the Government interfered with this channel any more than with the others. After the re-purchase of the Polaki estate we find the Government controlling and directing the improvement, maintenance and repair of all the channels, but after the re-purchase of the Polaki estate the Government had a substantial interest in all, as considerable areas of ryotwari land were irrigated by all. On the whole the evidence seems to me to support the contention that the beds of the channels were not reserved by the Government at the permanent settlement but passed with the lands to the respective purchasers in so far as they lay within the limits of the land purchased by each, to the same extent and in the same way as tank beds, village sites and other poramboke lands. That, however, as I have already said, does not decide the questions at issue in these suits. It does not follow because the Zemindar provides the necessary channels to enable the irrigation of the Zemindari lands, that although those channels carry water supplied from a river or channel belonging to the Government, the irrigation is nevertheless exempt from water cess.

It is argued, however, if I understood Mr. Ramachandra Aiyar aright, that the non-reservation of the channel beds is evidence that the grant was intended to convey the right to use all the water flowing in the channels without interference or charge, that

1. (1905) I. L. R. 28 M. 539.

is to say, is evidence of an engagement with the Zemindar freeing all the land commanded by the channels from separate charge for irrigation. But I do not think we can, from the non-reservation of the beds, presume anything more than that the Government fixed the revenue with reference to the extent of land under irrigation at the time: we have none of the permanent settlement accounts before us and no evidence that the *peshcush* of the Zemindari was fixed with a view to any possible extension of irrigation. Statements such as those to which we have been referred in the 5th Report, expressing a hope that a permanent settlement would have the effect of improving and extending the cultivation of the country, are not evidence of an agreement in any particular case to permit free irrigation from Government sources of water supply.

The abstention of the Government from charging water-cess until 1901 is adduced as evidence of an agreement, but does not help the Zemindar. When the origin of title is not known, as in the case of some inams granted before the permanent settlement, the fact that irrigation has been permitted free of charge for a series of years may be evidence of a lost grant, but in the present case we know that before the settlement in 1803 the Government had the full rights of owner (apart from ryot's, if any) in all the land and water-courses, and we know what is contained in the Sanad under which the Zemindar holds. There is, therefore, no room for presuming another grant of irrigation rights.

It was suggested that an agreement between the different Zemindars may be presumed, but that, if anything, could bind the Government as re-purchaser only so far as it relates to rights in the Zemindar from whom the purchase was made: the right to make a separate charge for irrigation, if it then existed in the Government, was not sold to the Zemindar.

There is a quantity of evidence as to the construction and repair of works in the different channels, but I do not think it is of great significance in the present case. I will take it in favour of the Zemindar that the works constructed and the repairs executed by the Government were to secure a supply of water for irrigation principally for the benefit of the ryotwari lands under the channels and the expenditure on such works and repairs can be roughly apportioned between the Government and the Zemindar as proportional to the areas of ryotwari and zemindari land

respectively commanded by the channels; but it does not seem to me that that helps the case of the Zemindar. An arrangement of this kind for the upkeep of the channels by the parties interested might be equally just and fair whether the water which reaches the land is supplied free of charge or has to be paid for.

Then it is urged that we have the admission of officers of the Government that the irrigation is to be free of charge. It is not contended that these admissions bind the Government but only that they are evidence in support of the existence of the suggested engagement.

In 1886 the question of charging water rate was raised and the Collector expressed an opinion that the Lukulam and Mobagam channels should irrigate free of charge on the ground that they were maintained and repaired by the Zemindar and Agraharamdars. In 1893 the Zemindarni claimed the right to irrigate as much as she liked without separate charge, and the Collector was of opinion that no charge should be made: he took the ground that documents shewed that the Zemindarni had the right she claimed, and that in the absence of a regular survey of the zemindari it could not be ascertained whether or not the area then under irrigation exceeded the area shewn in the 'gudikat' accounts as irrigable. (Exhibit FF).

The documents on which the Collector relied were, first, an agreement between the Polaki and Urlam Zemindars in 1842; we do not know the purport of this agreement, but so far as I can see, it could not affect the Government to levy water cess though it might affect the right to regulate the flow of water in the Polaki channel to the lands of the Urlam Zemindari. Secondly, some correspondence in 1861 in the course of which the Government Engineer directed that water was to be allowed to the Zemindar 'for present and future crops to the end of the year' as usual. We do not know the grounds on which the Board of Revenue accepted the Collector's recommendation. They are not detailed in Exhibit R 1, but so far as the right to irrigate second crop was in question the Collector's view that the Zemindar's right was proved must have been accepted; justification for the result, as far as the extension of irrigation to dry lands was in question, is found in the impossibility of ascertaining the area of the extension without a survey which apparently was considered not worth the expense involved.

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There is in all this no evidence with indicates any engagement with the Government other than that which can be inferred from the Permanent Settlement, namely, that the peshcush being fixed with reference to the area of land then under irrigation no further charge for the use of water should be made in respect of that area. (As to this see correspondence XXIV series).

In the absence of any more extensive engagement then, it has to be decided whether the Urlam Zemindari is supplied with water from a river, stream or channel belonging to the Government.

I have little doubt that it is so supplied.

Mr. Sundara Aiyar relied on Act III of 1905 as declaratory of the law and I did not understand Mr. RamachandraAiyar to dissent from his contention on that point. His argument was that the Act left the law as it was before except in the matter of encroachments on land.

But the provisions of S. 2 are clear enough and we cannot ignore a declaration contained in that section simply because the other provisions of the Act deal principally with the question of encroachments on public land. So far as this case is concerned the provisions of S. 2 amount to a declaration, that, subject to easement and natural rights of other land-holders, all standing and flowing waters which are not the property of any one else are the property of the Government. Now clearly the waters of the Vamsadhara river do not belong to any one else: the owners of land on the river do not own the water: their natural right as defined by the Easements Act is saved by Act III of 1905, but it is not contended that the water is their 'property.' It follows that it is the property of the Government.

And if the body of water forming the river is the property of the Government, the river, it seems to me, belongs to the Government within the meaning of Act VII of 1865, even though the bed may be vested in the owners of land along the banks, so as to give them the right to accretions or 'lankas' forming therein. The Vamsadhara river is undoubtedly a natural stream, and the definition of a "natural stream" given in the Explanation to S. 7 of the Easements Act indicates that in the eye of the law the stream is the flowing body of water—and

a "stream" was defined by Lord *Watson* in *M'Nab* v. *Robertson*[1] as "a body of water having as such body a continuous flow in one direction."

In this view it becomes unnecessary to discuss the question whether the bed of the Vamsadhara belongs to the Government as being the bed of a navigable river. It may be that for a portion of its course the land-owners on either bank have proprietary rights in the bank and bed; that, in my opinion, will not prevent the river from being a river belonging to the Government within the meaning of Act VII of 1865.

The District Judge seems to be of opinion that it is not the river but the artificial channels which are to be regarded as the source of supply within the meaning of the Act VII of 1865: I did not understand that Mr. Ramhchandra Aiyar supported that view; he rested his case in regard to the river on the contention that the river bed did not belong to the Government.

It remains to be seen to what extent the levy of water cess is lawful in the present cases, and here it is desirable to deal separately with the different appeals.

Appeal No. 66 *of* 1905.

Appeal 66 of 1905 is an appeal by the Zemindar from the decree of the District Judge in Original Suit No. 3 of 1904 dismissing a suit to recover money paid as water cess on Zemindari jerayati land irrigated for second crop from the Polaki, Jalmuru and Lukulam channels.

The irrigation accounts (see for example Exhibit XC) on which the charges are based shew that the second crops in question are not what are ordinarily known as 'wet' crops, *i. e.*, crops requiring constant irrigation: they are crops irrigated by one or two floodings of the ground, principally green gram and gingelly, and if it be found that crops of this kind were grown and irrigated at the time of the permanent settlement, we must imply an enagagement to make no separate charge for irrigation in the future.

There is naturally not much evidence now, in the absence of any accounts prior to the settlement, and the abstention of the Government from making any charge for so long a period after the enactment of Act VII of 1865 has placed the Zemindar in

1. (1897) A. C. 139.

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a difficult position; but the burden is on the Zemindar to prove the extent of his right (*Maria Susai Mudaliar* v. *The Secretary of State for India in Council* [1]) and, in my opinion, the evidence is insufficient to discharge it. At the most the evidence shews that it is probable that some land in the Zemindari was before 1803 cropped with second crops such as are now grown therein.

Exhibit B (1823) shews that spring crops were watered in Kottapolavalasa and probably in Kabakam in that year. In Exhibit D (1855) the inamdars of Lukulam complain that much water is taken to grow spring crops in Polaki village which ought to come to their channels. In Exhibit O (1861) the Engineer directs a subordinate to make provision for the irrigation of 'present and future crops' to the end of the year. There is also evidence that at the inam settlement about the same year second crops of 'green gram, &c.' were very generally grown on the inam lands. The District Judge relies on a remark at page 232 of the District Manual as indicating that the raising of a second crop is exceptional, but that remark, it seems to me, refers only to second crops of paddy and sugar-cane, the staples referred to in the preceding paragraph. Some passages on page 238 are more relevant to the present case. Second crops of green gram, it is there stated, are sometimes raised on paddy land when there is water: and again wet lands are used for oil seeds in April and May. I have already remarked that the second crops on which the charge is levied are principally green gram and gingelly (an oil seed crop).

In Exhibit LXIV (1810) the Collector informed the Board of Revenue that Urlam Zamindari was then reckoned one of the best, if not the best of the estates in the Chicacole Taluq, and from Exhibit XXIV we find that it was the opinion of the officers of Government that the peshcush was fixed at a high rate.

We get no aid from the practice of the Urlam Zemindar: the rents paid by the ryots were in 1884 fixed "at conventional rates not based on any ascertained principle" (Exhibit XXIX), and we have nothing before us to shew whether these rates prevailed at the time of the Permanent Settlement or are calculated so as to give the Zemindar a share of the profits of two crops.

1 (1904) 14 M. L. J. at 354.

I do not think there is any other evidence on this point to which we have been referred, and it is impossible to differ from the District Judge's conclusion that we have not enough to shew that the charge of water cess on second crop jerayati is not legal. Appeal No. 66 of 1905 must, therefore, be dismissed with costs.

Appeals Nos. 64 *and* 65 *of* 1907.

Appeals Nos. 64 and 65 of 1907 and the Memorandum of Objections in Appeal No. 64 next fall to be considered. Appeal No. 64 of 1907 is presented by the Zemindar from the decree of the District Judge in Original Suit No. 19 of 1905. In that suit three questions were raised as to the right of the Government to levy water cess: (1) as in Original Suit No. 3 of 1904 on second crop on jerayati land; (2) on first and second crops on inam lands, and (3) on first and second crops on jerayati land alleged by the Government to have been unirrigated or 'dry' at the time of the Premanent Settlement. The District Judge upheld the claim of the Government so far as it related to irrigation from the Jalmuru, Polaki and Lukulam channels, but, holding that the Mobagam channel belonged to the Zemindar, declared that the Government is not entitled to levy water cess on lands irrigated under that channel.

The Zemindar appeals in Appeal Suit No. 64 of 1907, and the Government by a Memorandum of Objections raises the question of its rights in respect of the Mobagam channel. Appeal No. 65 of 1907 is by the Government and is put on the same grounds as the Memorandum of Objections.

As regards extension of irrigation in jerayati land, *i. e.*, the conversion of 'dry' land into 'wet,' I have already pointed out that the only engagement on which the Zemindarni can rely is an engagement enabling her to irrigate free of separate charge the extent of land which was classed as 'wet' at the time of the permanent settlement. In arriving at a conclusion as to this extent the District Judge has relied on accounts prepared in 1853 shewing the areas then irrigated. These accounts (called the gudikat accounts) though not based on an accurate survey and measurement of the lands (Exhibit FF, para 7) were found by the Inam Deputy Collector to have been carefully prepared (Exhibit LXXI, 1st paragraph) and were in some cases accepted

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as the basis of the Inam settlement. They form the most trustworthy evidence we have on which to base an estimate of the extent of irrigation at the date of their preparation, and as there is no evidence of any decrease of cultivation between 1803 and 1853 it is not likely that they err generally in favour of the Government. But a discrepancy was pointed out to us as an example of their inaccuracy: Exhibit LXIX, the gudikat account of the Urlam village, is inconsistent with Exhibit CVII, the water rate account of the same village. The area of 'wet' land taken from the gudikat account is 706 acres: the area actually irrigated is found to be 1,039 acres, and the difference between the two is charged with water cess. But 1,039 acres is more than the whole cultivated area including inams as given in the gudikat account, and almost equal to the total area of the village including porambokes. Mr. Sundara Aiyar suggests that the difference may be accounted for by the cultivation of porambokes but there is no evidence in support of the suggestion. In the absence of any such evidence it is fair to infer that the difference is due to an underestimating of the area by the officer responsible for the preparation of the gudikat accounts. In Exhibit FF, the Collector suggested that the Government might allow 10 *per cent.* of the estimated area for possible inaccuracies in the estimate, but this does not appear to have been done. Possibly the Government officers were of opinion that any under-estimate which might operate to the prejudice of the Zemindar would be compensated by probable extensions of irrigation between 1803 and 1853, which were left out of account and this may in general be a fair assumption although there is in fact no evidence of any great extension of irrigation, and Exhibit XXIV shows that under the Polaki channel the improvements made had rendered the supply sufficient for the lands already irrigable but had probably not resulted in any large extension of irrigation to the 'dry' lands.

But in the case of Urlam village we have positive evidence that the area of wet land must have been more than 706 acres in 1853, while there is no evidence that it was not more than that extent in 1803. In these circumstances it seems to me that an attempt should be made to estimate the probable extent of the under-estimate.

The area of 'dry' land in the gudikat account (LXIX) is so small that the inaccuracy must be to a large extent in the

estimate of the 'wet' land: and I would arrive at a conclusion by the following method. Assume in favour of the Government that all the dry cultivable land in the village has been converted into wet: then 745½ acres (the total Sarkar cultivable area as per gudikat account) represents an actual area of 1,039 acres: and 706 acres as per gudikat account represents 984 acres on the ground, and this is the area of the 'mamul wet.'

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We are not asked by either side to adopt this method of cultivation. For the Zemindar it is urged that the discrepancy is enough to discredit the whole gudikat accounts, and for the Government that we should assume that the difference is due to cultivation of poramboke lands. I am not prepared to do either. The gudikat accounts may be accepted where there is no evidence to discredit them, and corrected by the method I propose when there is clearly an under-estimate.

There is a similar under-estimate in regard to the village of Kobagam where the total Sarkar area is 395 acres while the actual area charged is 410 acres, the mamul wet being 360 acres. The difference in this case is small. By the same method of calculation 360 acres as per gudikat account will be found to represent 370 on the ground. The extent on which the Government is entitled to charge water cess will therefore be in Urlam 1039—984 = 55 acres and in Kobagam 410—370 = 40 acres.

As to the inams we have the accounts prepared at the Inam Settlement and there is nothing to suggest that they are incorrect. We must accept them.

In the case of second crop on jerayati lands I have already shewn that the Zemindar has failed to make out a right to free irrigation.

Then as to second crop on inam lands we have to go by the inam settlement. The difficulty arises because there are no statements of areas grown with second crop at the date of the settlement, but there are statements made by the Inam Deputy Collector which indicate that in estimating the income from the land the cultivation of second crops was taken into consideration

In Exhibit LXXVI we have an explanation of the method adopted to ascertain the profits of the land. The village under consideration was compared, with reference to its fertility and

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irrigation facilities, with some village in the neighbouring Polaki Estate which had shortly before come into the hands of the Government and an acreage rate of rent or land tax was fixed, based on an average of the rates obtaining in the Polaki Estate village taken for comparison.

In considering the fertility of the village the question whether the lands are cultivated with second crop is always taken into account, and except in the village of Venkatapuram, we find from the statements that the cultivation of second crops was general. I do not understand the District Judge to say that the acreage rates were fixed without reference to this factor; his view seems to be that the second crops to which reference is made in the statements were not irrigated crops.

In that view I have no doubt he is wrong; he relies on a remark in Exhibit LXXI to the effect that 'wet grain and paddy' are not grown as second crops in Lukulam, but the crops on which the Government is now charging water-cess are not "wet grain or paddy," but green gram, gingelly, chillies, &c. The statements shew that this kind of crop was grown generally as second crop on wet lands, and the District Judge's surmise that it was grown without irrigation is unlikely to be correct.

For in the first place if those crops were generally irrigated in 1901, it is not unreasonable to suppose that they did not grow without irrigation in 1861; secondly, in the statement for Venkatapuram village it is alleged that the lands are not cultivated a second time "*for want of water*": the obvious inference being that in the other villages where the lands are cultivated a second time that cultivation is with the aid of water; and thirdly, I may remark that in dealing with O. S. No. 30 of 1906 (Appeals Nos. 129 and 134 of 1907) the District Judge himself found 'that for such crops one flooding to prepare the land was essential.' I conclude from all the evidence on this point that the assessment of the inams was fixed with reference to the capacity of the land to grow an irrigated second crop, and consequently, when second crops were grown, includes a payment for such crop: and the Government cannot demand a second payment on the same account.

Appeal No. 65 of 1907 is by the Government, claiming the right to charge water-cess on lands irrigated from the Mobagam

channel. The District Judge has disallowed this claim holding that the Mobagam channel belongs to the Zemindar. I have shewn that the water of all these channels is supplied or used from a river belonging to the Government and that the ownership of the bed of the channel is really beside the question. Appeal No. 65 of 1907 must be allowed.

A question is raised on behalf of the Government whether the Zemindar is entitled to recover anything, whatever be the result of our decision on the other questions. It is urged that the payment of the water-cess must be regarded as a voluntary and, therefore, irrecoverable payment, because it was made without any actual attachment or distraint of the Zemindar's property. The case *Muthayya Chetti* v. *Secretary of State for India*[1] is relied on. The plea is one which I suppose the advisers of the Government feel bound to raise, though probably a refund would, as a matter of fact, follow on a declaration by the Courts of the Zemindar's right to free irrigation of land on which water-cess had been collected.

But I do not think the plea can be sustained. A demand by the Government having at its back the powers given by Act II of 1864 must, unless in special circumstances, which are not shewn here, amount to a threat of distraint if the money demanded is not paid, and if payment is made to prevent the execution of that threat, I am unable to see how the payment can be regarded as a voluntary payment. (See *Narayanasami Reddi* v. *Osuru Reddi*[2] and *Lutchmee Doss* v. *Secretary of State for India*[3]

I would therefore modify the decree and refuse the declara-(*a*) prayed for in paragraph 30 of the plaint: grant a declaration that the plaintiff is entitled to irrigate free of water cess second crops grown on the inam lands belonging to her except on those situated in the village of Venkatapuram to the extent of the wet area specified in the respective title deeds, by means of water flowing &c , as in prayer (*b*) of paragraph 30 of the plaint, and direct payment to the plaintiff of the amount collected for second crop on inams so far as the collection is unauthorised by this declaration—and also payment of the difference between the claim on jerayati first crop in Urlam village and the amount due

1. (1898) I. L. R. 22 M. 100. 2. (1902) I. L. R., 25 M. 548.
3. (1909) I. L. R. 32 M. 456.

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taking the extent of mamul wet to be 984 instead of 706 acres, the extent in Kobagam village being 370 instead of 360 acres. As to interest the District Judge allowed interest and we do not intend to disallow it. Interest will be allowed on the sums decreed at the rates allowed by the District Judge up to the date of decree and at 6 per cent on the aggregate after the date of decree till the date of payment.

Each party should pay his own costs in Appeals Nos. 64 and 65 of 1907. As the memorandum of objections in Appeal No. 64 of 1907 is unnecessary, it must be dismissed but, as its grounds are identical with those in Appeal No. 65 of 1907, its presentation cannot have increased the costs of the plaintiff and it will be dismissed without costs. Each party should bear his own costs in the lower Court.

Appeals Nos. 129 *and* 134 *of* 1907.

These are appeals from the Subordinate Judge's decree in Original Suit No. 30 of 1906.

The suit was for declaration similar to those prayed for in Original Suit No. 19 of 1905 and refund of water-cess collected for Fasli 1314, and our decree should follow that in Appeals No. 64 and 65 of 1907. There is one question raised which was not in Original Suit No. 19 of 1905 and which requires separate consideration. It is dealt with in the 12th and following grounds of appeal in Appeal No. 134 of 1907 and in the 13th and following paragraphs of the Judgment of the District Judge. I agree with the District Judge on the evidence that the water was used to irrigate second crops on lands ordinarily irrigated from the Mobagam channel, and that the water so used was surplus water of the Polaki channel and was carried to the Mobagam channel through various branch channels.

I also agree with the District Judge that clause (*b*) of Section 1 of Act VII of 1865 does not apply to the case because the land was not irrigated by water flowing from or through adjoining land within the meaning of that section nor was it stored in a reservoir and thereafter used. But it seems to me that clause (*a*) is applicable: the water is used from a river belonging to the Government, just as much as is any other water used from the Polaki channel. The question what would be the rights of the parties supposing the water of the Mobagam channel were

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mixed with those of the Polaki channel does not arise, whether the irrigation from the Mobagam channel is or is not irrigation with water supplied from a river belonging to the Government: because no water from the Mobagam channel head was used in this case and for the purpose of this question the Mobagam channel bed formed only a branch channel from the Polaki channels. I would allow the Appeal No. 134 of 1907 on this point, and in other respects modify the decree in the manner indicated in disposing of the Appeals Nos. 64 and 65 of 1907. Each party should bear his own costs in Appeal No. 129; and Appeal No. 134 is allowed with costs. Each party should bear his own costs in the lower Court.

Appeals Nos. 35 *and* 36 *of* 1905.

Appeals Nos. 35 and 36 of 1905 are appeals from the decree of the District Judge in Original Suits Nos. 37 and 38 of 1901 by the Lukulam Agraharamdars in regard to water cess on second crops grown on wet lands in their agraharam.

It seems to me clear from Exhibit H (which is Exhibit LXXI in Appeal No. 64 of 1907) that the rates fixed in order to arrive at the quit-rent stated in Exhibit J were struck in consideration of the circumstance that the lands were generally grown with second crops. It cannot be doubted, I think, that in arriving at his rate of 6 Rupees per acre the Inam Deputy Collector relied on the fact that even in unfavourable seasons the wet lands were twice cultivated. It follows that a payment for a second crop irrigated, at any rate for a second crop of the kind on which water-cess is now levied, was included in the amount on which the quit-rent was fixed, and a further charge on that amount would be a violation of the engagement implied in the grant J.

Appeals Nos. 35 and 36 of 1905 must be allowed and the respective plaintiffs in Original Suits Nos. 37 and 38 of 1903 given decrees declaring that of the lands in their agraharam classed as wet lands the extent specfied in their title-deeds is entitled to irrigation free ot water-cess for second crops of gingelly, green gram, ragi, etc., raised thereon after the ordinary wet crop with the water of the Vamsadhara river through the Lukulam and Modagam geddas (in Appeal No. 35 of 1905) and through the Lukulam gedda (in Appeal No. 36 of 1905) and a direction to

Kandakuru Mahalakshmamma v. The Secretary of State for India. — Miller J.

refund the amount claimed with interest at 6 per cent. from date of levy to date of payment.

In the lower Court and in the appeals the parties will pay their own costs as the agraharamdars in their claim for unlimited free irrigation.

Appeal No. 40 *of* 1905.

In Appeal No. 40 of 1905 the Government succeeds so far as the declaration is concerned, but fails as regards the second crop charge claimed. Each party may, therefore, bear his own costs.

Appeal No. 41 *of* 1905.

Appeal No. 41 of 1905 is an appeal from the decree of the Districe Judge in Original Suit No. 38 of 1903 in so far as it refuses costs to the Government. As I hold that Original Suit No. 38 of 1903 ought not to have been dismissed and that each party thereto ought to pay his own costs, I think this appeal must be dismissed with costs.

S. A. No. 237 *of* 1907.

Second Appeal No. 237 of 1907 is an appeal by the Government from the decree of the District Judge in Appeal No. 161 of 1906 on his file. He there held that the Government was not entitled to collect water-cess on the second crop raised on their inam lands by means of water drawn from the Mobagam channels.

The plaintiffs did not set up any engagement with the Government or give evidence of any such engagement. They rested their case on an alleged right to irrigate from the Mobagam channel free of water-cess. I am of opinion that they have not that right for reasons already given: and in the absence of any engagement, the Government is entitled to levy a separate charge on second crops.

The appeal must, therefore, be allowed and the suit dismissed with costs throughout.

Munro, J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Koshikot Pudiya Kovilagath Sreeman Vikraman *alias* Cheriya Rajah Avergal .. Appellant*

v.

Chundayil Madattil Ananta Pattar & others .. Respondents.

Sreeman Vikraman v. Ananta Pattar.

Madras Acts—Malabar Tenants Improvements Act I of 1900, S. 19—Contracts before 1886—Effect of.

A mere provision for the payment of customary compensation is not a special contract such as is contemplated by S. 7 of Madras Act, I of 1887, corresponding to S. 19 of Madras Act I of 1900.

Obiter :—There is nothing in S. 19 of Madras Act I of 1900 which deals with a mere contract regulating the rates of compensation whether before or after 1st January 1886. If such a contract is favourable to the tenant he could always insist on it despite the provisions of S. 6 ; if it is unfavourable to the tenant, even though the contract was entered into before 1886, he is entitled to compensation under S. 5 and the rates prescribed in sections 9 to 18 must then prevail. If the contract before 1886 restrained the tenant from making improvements and claiming compensation therefor, such contract would *prima facie* be valid, apart from any question of the existing law rendering the restraint invalid.

Second appeal from the decree of the Subordinate Judge of Palghat in O. S. No. 178 of 1908, presented against the decree of the District Munsif of Manjeri, in O. S. No. 658 of 1906.

P. R. Sundara Aiyar and *C. V. Ananthakrishna Aiyar* for appellants.

C. K. Mahadeva Aiyar for respondents.

P. R. Sundara Aiyar:—It is clear from Ss. 9 to 16, Malabar Tenants Improvement Act, that the only guide in the assessment of compensation is to be the Act and not either custom or contract. S. 6 can affect the assessment only in so far as it saves contracts affecting the right to make compensation. Contracts that do not curtail the right to make improvement but only provide rates of payment are not saved by the Act. In *Randu Purayil Kunhisore* v. *Neroth Kunhi Kanan* [1] the only point that is considered is whether there is any difference between improvements effected before 1886 and those effected after that date, and the Full Bench rightly held that there was none. No question was raised there as

*S. A. 228 of 1909. 28th April 1910.

1. (1907) I. L. R. 32 M. 1.

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to the scope of S. 6 of the Act. Otherwise, the decision in *Randu Purayil Kunhisore* v. *Neroth Kunhi Kannan*[1] would be at variance with the Full Bench decision in *Kerala Varma Valia Raja* v. *Ramunni Shangaran*[2]. At any rate, contract to pay according to the customary rate is not a special contract within the meaning of the Act—*ibid.* In effect, it is only an agreement to pay according to the law.

C. K. Mahadeva Aiyar relied upon the Full Bench decision in *Randu Purayil Kunhisore* v. *Neroth Kunhi Kannan* [1] as laying down necessarily that a contract prescribing rates was good, that the contract was a special contract (cf. *Kerlavarma Valia Raja* v. *Ramunni Shangaran*[2] itself). He contended that when there is an express contract there is no scope for implied covenants or any implication of law—NORTON on *Deeds*, p. 116, and the cases cited therein.

P. R. Sundara Aiyar.—[*Aiyar* J.—S. 6 has reference only to rights created by S. 5 and not to rights created by contract.] When the tenant bases his right to compensation on a contract and not upon S. 5 (which is not this case) then the rules laid down for assessment in the Act would not affect him. In other words, the object of the Act is to preclude the landlord from curtailing by contract the rights of the tenant, and not to preclude the tenant from providing for better terms than the Act allows him.

The Court delivered the following

JUDGMENT:—This second appeal relates to improvements. The *kanom* sought to be redeemed is dated the 3rd of November 1872. It provided that the tenant shall accept the value of improvements according to local custom. The Subordinate Judge has held that the provision amounts to a special contract which is unaffected by the Malabar Tenants Improvements Act. He directed an enquiry into the customary rates and has awarded to the defendants a lesser sum for improvements than the Munsif fixed in accordance with the provisions of the Act. Now, S. 5 of Madras Act I of 1900 declares every tenant entitled to compensation for improvements on ejectment. S. 6 provides that the amount of compensation when claimed under S. 5 shall be computed according to Ss. 9 to 18. But he may instead claim compensation according to the

1. (1907) I.L.R. 32 M.1. 2. (1892) 3 M.L.J. 51.

Sreeman Vikraman v. Ananta Pattar.

provision contained in any contract between the parties. In that case, S. 6 has no application, nor have Ss. 9 to 18. In this case, the tenant claims compensation under S. 5. It would *prima facie* seem, therefore, that the rate of compensation is to be determined in accordance with Ss. 9 to 18. But it is argued that S. 19 of the Act validates all contracts prior to the 1st day of January 1886 by implication, and that such contracts should be given effect to in their integrity. Assuming this to be so, is there any contract in this case prescribing particular rates of compensation? The authority of the Full Bench in *Kerala Varma Valia Rajah* v. *Ramunni Shangaran* [1] is against such a contention. It is there pointed out that a mere provision for the customary compensation is not a special contract such as is contemplated in S. 7 of Madras Act I of 1887 which corresponds to S. 19 of the Act of 1900. There is no contract in this case for particular rates to be enforced. It merely states in express terms, what would otherwise be imported into the contract, that the parties shall conform to the usage of the country. There being no special contract, the tenant is entitled to compensation according to the Act.

This is enough to dispose of this case. But as we have listened to an able argument from Mr. Sundara Iyer on the section of the Act which relates to the effect of contracts before the 1st of January 1886, we think it desirable to indicate our opinion on the points dealt with.

The question is, whether the tenant is entitled to claim compensation under the Act where there is a contract before the Act prescribing lesser rates. It seems to us he is not precluded from doing so. S. 19 deals with contracts limiting the right to make improvements and to claim compensation. Contracts before the 1st day of January of 1886, cutting down the right to make improvements, are left untouched and may be deemed to be valid, if by the law in force at that time they would be treated as valid. There is nothing in S. 19 which deals with a mere contract regulating the rates of compensation, whether before or after the 1st day of January 1886. And if such a contract is favourable to the tenant, he could always insist on it despite the provision in S. 6. If a contract as to the

1. (1892) I. L. R. 16 M. 452.

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rates of compensation is unfavourable to the tenant, even though it has been entered into before 1886, he is entitled to claim compensation under S. 5, and the rates prescribed in sections 9 to 18 must then prevail. We do not think that the recent Full Bench decision in *Randu Purayil Kunhisore* v. *Neroth Kunhi Kannan*[1] is against our view. The question there was, as would appear from the referring order, whether the making of the improvements after 1886 disentitled the tenant to the rates fixed by the contract before that date, and the Full Bench held that a contract made prior to the 1st January 1886 was unaffected, whether the improvements were made before or after. There is no authority for the position that mere rates of compensation fixed by contract before the Act are decisive as between the parties and preclude the tenant from claiming the rates under the Act if he elects to proceed under S. 5. If, on the other hand, a contract before 1886 restrained the tenant from making improvements and claiming compensation therefor, such a contract would *prima facie* be valid, apart from any question of customary law rendering the restraint invalid.

We reverse the judgment of the Subordinate Judge and restore the Munsif's decree with the modification that the defendants Nos. 1 to 3 will have their costs throughout. The memorandum of objections is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present :—Mr. Justice Miller and Mr. Justice Abdur Rahim.

Rangasawmi Iyengar .. Appellant*
v. (*Plaintiff*)
Annathurai Iyengar & others ..Respondents
(*Defendants*).

Hindu Law—Joint family—Suit by Manager—No presumption of representative capacity

There is no presumption of law that a suit by a Manager of a joint Hindu family is in his representative capacity as Manager; and where the question itself is not raised as to his having represented the family, a Court will be acting rightly in holding that he sued in his own personal capacity.

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1. (1907) I. L. R. 32 M. 1.

*S. A. No. 1796 of 1908. 8th April 1910.

Rangasawmi Iyengar v. Annathurai Iyengar.

Second appeal from the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 829 of 1907 presented against the decree of the Court of the District Munsif of Tiruvadi in O. S. No. 273 of 1906.

In a previous suit the present 1st defendant, as plaintiff, sued the present plaintiff that a mortgage executed by his father in favour of the present plaintiff was discharged, and that suit was dismissed on the finding that the discharge was not proved.

The present suit was for recovery of the mortgage amount from the 1st defendant and his sons, the other defendants. The lower Courts in this case found that the discharge was proved and gave a decree only againt the 1st defendant on the ground of *res judicata*. The plaintiff appealed.

The Advocate-General (*P. S. Sivaswami Aiyer*) and *P. S. Subramania Aiyar* for appellant.

T. Narasimha Aiyangar and *N. Rajagopalachari* for respondents.

The Advocate-General:—The previous decision that the discharge was not proved is *res judicata* as against the sons, especially adult sons, as the father sued therein only in his representative capacity. The father is generally the manager, and his acts and suits by or against him are only in a representative character and bind his sons—Explanation 5 of S. 13, C. P. C.; *Narayan Gop Habbet* v. *Pandurang Ganue*[1]; *Daulat Ram* v. *Mehr Chand*[2]; *Sheo Prasad Singh* v. *Saheb Lal*[3]; *Baldeo Sonar* v. *Mobarak Ali Khan*[4]; *Sakharam* v. *Deoji*[5]; *Kunjan Chetti* v. *Sidda Pillai*[6]; *Ramasamy* v. *Jagannada*[7]; *Hari Vithal* v. *Jairam Vithal*[8]; MAYNE'S *Hindu Law*, 7th Edn., S. 333.

T. Narasimha Aiyangar:—That the suit was conducted in a representative character is a question of fact and it cannot be presumed. Neither the plaint nor other records therein show that the father sued in his representative character of manager. The onus of proving that it was in a representative character is upon the creditor—*Appa Row* v. *Venkadri*[9]; S. 50, Explanation, C. P. C. The sons do not derive their right from their father in

1. (1881) I. L. R. 5 B. 685.
2. (1881) I. L. R. 15 C. 70 (P. C).
3. (1892) I. L. R. 20 C. 453, 460.
4. (1902) I. L. R. 29 C. 583.
5. (1898) I. L. R. 23 B. 372.
6. (1899) I. L. R. 22 M. 461.
7. (1907) 17 M. L. J. 54, 542.
8. (1890) I. L. R. 14 B. 597.
9. (1907) 17 M. L. J. 197.

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a joint Hindu family—*Ram Narain* v. *Bisheshar Prasad*[1]; *Sundar Lal* v. *Chhitar Mal* [2]. In the case of a contract, as in this case, all the members of the family must be made parties if their interests also are sought to be bound. *Kunjan Chetti* v. *Sidda Pillai* [3] is on trespass. I refer also to *Hari Gopal* v. *Gokaldas Kushaba Shet*[4]; *Arunachalla* v. *Vythilinga*[5].

The Advocate General in reply :—A father who is generally capable is the manager—MAYNE's *Hindu Law*, p. 439; *Gan Savant Bal Savant* v. *Narayan Ahond Savant* [6].

The Court delivered the following

JUDGMENT :—The suit is on a mortgage executed by the father of the 1st defendant in favour of the 1st defendant's daughter. The 1st defendant sued in O. S. No. 407 of 1903 for a declaration that the mortgage had been discharged by his father before his death. The suit was dismissed on appeal. The question is whether the 3rd, 4th and 5th defendants, who are the sons of the 1st defendant, can plead discharge of the mortgage as a defence to the present suit. It is the case of both sides that the answer depends on the further question whether the 1st defendant conducted the suit of 1903 on behalf of his family as managing member thereof. The Subordinate Judge says there is nothing to show that he maintained that suit in his representative capacity as manager of the family and not in his individual capacity; and against this it is contended for the appellant that the circumstances found raise a presumption that the suit was on behalf of the family. These circumstances are that the interests of the 1st defendant and his sons were identical, it being as much to their interest as to his to free the family land of the encumbrance and that the 1st defendant was the father of the family.

The plaint does not allege that the 1st defendant sued as manager, nor does it appear that the 1st defendant was asked any question upon that point; the question was, therefore, not clearly raised, and we are unable to say, as a matter of law, that the Subordinate Judge was bound to raise a presumption on the circumstances relied on by the appellant.

The second appeal is dismissed with costs.

1. (1888) I. L. R. 10 A. 411.
2. (1906) I. L. R. 29 A. 1.
3. (1899) I. L. R. 22 M. 461
4. (1887) I. L. R. 12 B. 158.
5. (1882) I. L. R. 6 M. 27, 28.
6. (1883) I. L. R. 7 B. 467.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

Devulapalli Kameswara Sastry & others .. Appellants*
v. (*Plaintiffs*)
Polavarapu Veeracharlu, minor, by his guardian Kodamanchi Bhimanna .. Respondents
(*Defendants*).

Kameswara Sastry v. Veeracharlu

Hindu Law—Joint family—Alienation for family purpose—Powers of alienation of a manager, a widow and a father—"Need or necessity," meaning of—Marriage a necessary Samskara and a family purpose—Alienation for marriage of co-parcener valid—Marriage among Sudras.

Among Sudras, marriage is an initiatory ceremony or Samskara and perhaps the most important of Samskaras performed by them; and consequently a loan contracted for the marriage of a co-parcener in a joint Hindu family of Sudras is for a family purpose and, therefore, binding on the other members.

Obiter:—Marriage is an obligatory Samskara in the case of every Hindu, to whatever caste he may belong, unless, in the case of a twice born, he be a *Naishtika Brahmacharin*. [*Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*[1] not followed. Observations in *Ponnappa Pillai* v. *Pappuvayyangar*[2] dissented from.]

Meaning of the phrase "family necessity" explained.

"The need or the reasonably credited necessity" spoken of in *Hanuman Persaud's case*[3] only means a legitimate family purpose. A manager of a Hindu joint family can alienate property for a legitimate family purpose. A widow in possession can charge the estate so as to bind the reversioners for the same purpose, and for the performance of religious ceremonies or pilgrimages for the benefit of her husband's soul. A Hindu father can alienate it for discharging an antecedent debt, and in the absence of an antecedent debt for a "family purpose."

Second Appeal from the decree of the Subordinate Judge's Court of Cocanada in A. S. No. 146 of 1906, presented against the decree of the Court of the District Munsif of Peddapur in O. S. No. 139 of 1906.

T. Prakasam for appellants.

P. Narayanamurti for respondents.

The Court delivered the following

JUDGMENTS:—*Abdur Rahim* J.:—I entirely agree in the conclusion reached by my brother Krishnaswami Aiyar in the learned and instructive judgment which he is about to read. I have nothing to add. The decree of the Subordinate Judge

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* S. A. No. 1506 of 1907. 21st September 1910.

1. (1903) I.L.R. 27 M. 206. 2. (1881) I.L.R. 4 M 1 at p. 20.

3. (1856) 6 M.I.A. at p. 393.

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will be set aside as regards the 3rd defendant and that of the District Munsif will be restored. There will be no costs.

Krishnaswami Aiyar J:—This second appeal has been preferred against the decree of the Subordinate Judge disallowing the plaintiffs' claim against the 3rd defendant's share in the mortgaged property. The mortgage was executed by the 1st defendant, the father, and the 2nd defendant, the adult son, while the 3rd defendant, a minor, was represented by the father, who also signed the document as his guardian. The money was borrowed for the marriage expenses of the 2nd defendant. The defendants have been dealt with as Sudras in this case, and no question has been raised as regards the correctness of that view. It is contended that the Subordinate Judge is wrong in holding that the marriage expenses of the 2nd defendant are not under the Hindu Law a justifiable necessity for the borrowing of money and the execution of the mortgage. The powers of a Hindu manager of family property have been expounded in the judgment of Lord Justice *Knight Bruce* in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1]. At page 423, his Lordship says: "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate." The need above referred to is afterwards spoken of at page 424 as "a sufficient and reasonably credited necessity." *Bona-fide* and reasonable enquiry may be sufficient to validate the charge though the actual necessity is not made out. We may at once dismiss from consideration, so far as the present case is concerned, the justification of benefit to the estate. In the case of the father, the discharge of an antecedent debt is in addition a sufficient ground to justify alienation. As regards the widow who has succeeded to her husband's estate her power to charge it so as to bind her reversioners may extend to loans contracted for the performance of religious ceremonies or pilgrimages for the benefit of her husband's soul. As the present is not a case of an antecedent debt, the validity of the mortgage as regards the 3rd defendant's share must be tested with reference to the consideration whether it was a case of need. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, [2]

1. (1856) 6 M. I. A. p. 393. 2. (1879) I.L.R. 5 C. 148 (P.C.)

Kameswara Sastry v. Veeracharlu.

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it was held that the alienation would be valid if it was made by the managing member of the family "for legitimate family purposes." See page 101. The need or "the reasonably credited necessity" spoken of in *Hunooman Persaud's case*[1] has been paraphrased into "legitimate family purpose." Necessity therefore is not to be understood in the sense of what is absolutely indispensable but what, according to the notions of a Hindu family, would be regarded as reasonable and proper. Speaking of the cryptic phrase "legal necessity," GOLAPCHANDRA SARCAR SASTRI in his *Hindu Law*, page 210, observes: "The expression *legal necessity* is very often used to signify the causes for which, or the circumstances under which, a single member of a joint family, or a like person, having a limited interest in property, is authorised to transfer it so as to pass to the transferee a right to the entire property. It comprises maintenance and support of the family, preservation of the family estate, management of the family business, if any, perfor mance of necessary religious rites such as marriage and the like initiatory ceremonies, exequial rites and *Sraddha* ceremony,—and the payment of debts contracted for the above purposes." In the Tagore Lectures for 1884-85 BHATTACHARYA says at page 488: "Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical oblations to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the relatives,—these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are in the strict sense of the word, lawful necessity." In *Babaji Mahadaji* v. *Krishnaji Devji*,[2] where a sum of money was borrowed to buy a stock of buffaloes with which to resume the business of a milkman, it was held that the debt was contracted to put the father in the way of earning a maintenance and therefore under the pressure of family necessity. Mr. Justice WEST observes at page 669: "Family necessity is an expression that must receive a reasonable construction, and the

1. (1856) 6 M. I. A. at p. 393. 2. (1878) I. L. R. 2. B. 666.

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head of the family and those dealing with him must, in the interest of the family itself, be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude, too, must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with him from the need of all precaution, where a minor son has an interest in the property." Judged by these principles it is first of all difficult to suppose that the marriage of the 2nd defendant was not a legitimate family purpose. I put it to the respondent's vakil whether he contended that having regard to the age of the 2nd defendant at the time of the marriage it was not a purpose for which the father could legitimately incur expenditure or contract a loan He disclaimed any intention of resting his case on that ground. Dismissing therefore from consideration any question of propriety based on the ground of age, we are confronted with the broad question whether the father was justified in borrowing money for the marriage of his son while the income of his property was sufficient to meet the expenditure. In *Mahadeva Pandia* v. *Rama Narayana Pandia*[1], which was a case of partition between uncle and nephews, it was held that the nephews were entitled to deduct from the properties to be divided " the cost of the marriages of two of them as a legitimate charge on the family funds." In *Saravana Tevan* v. *Muttayi Ammal*[2], which was a suit to enforce a mortgage by the manager of the family, it was held that the loan incurred to defray the expenses of the marriage of a co-parcener was for a family purpose and showed a reasonable necessity to justify the alienation. See pages 382, 383 and 384. In *Gharibullah* v. *Khalak Singh*[3] the Privy Council spoke of a loan contracted for the marriage of a junior member as for a family purpose and as a case of necessity and upheld the alienation as binding upon the family. The gift of a small portion of family property by the father or by the widowed mother at the time of a daughter's marriage without the consent of the sons which has been upheld as valid cannot be justified on the ground of necessity in a strict sense—*Ramasami Ayyar* v. *Vengidusami Ayyar*[4] and *Kudutamma* v. *Narasimhacharyulu*[5]. These cases seem to be sufficient

1. (1902) 13 M. L. J. page 76.
2. (1871) 6 M.H. C. R. 371.
3. (1903) I. L. R. 25 A. 407.
4. (1898) I. L. R. 22 M. 113.
5. (1907) 17 M. L. J. 528.

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authority for holding that in case the debt is contracted for a family purpose (and the marriage of a junior member of a co-parcenary is a family purpose) and it is reasonably necessary on the part of a prudent manager to borrow the money for such expenditure, the transaction will bind the co-parceners. But the Subordinate Judge in the Court below and the learned vakil for the respondent have laid great stress on the decision in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*[1] where the learned *Chief Justice* and Mr. Justice *Moore* refused to uphold a sale of family lands by the father to defray the marriage expenses of one of his sons on the ground that there was no moral or religious obligation to get a son married That case, no doubt, which purports to follow some observations of Mr. Justice *Muthusami Aiyar* in *Ponnappa Pillai* v. *Pappuvayyangar*,[2] supports the respondent's contention. The parties to that case were Brahmins. It was held that as failure to perform marriage did not entail a forfeiture of caste it was not a necessary ceremony or *Samskara* in the case of a Brahmin and the expenditure incurred for the performance of such a ceremony was in consequence no justification for the incurring of a debt. None of the cases to which I have referred appears to have been cited. There is no reference to them in the judgment. The decision itself has been very ably criticised and dissented from by Mr. Justice *Chandavarkar* with the concurrence of *Knight* J. in *Sundrabai* v. *Shivnarayana*[3]. But for the fact that the defendants in the present case are Sudras to whom part of the reasoning in that case has no application, I should have felt inclined to ask the Full Bench to reconsider the decision in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*[1]. That case proceeds upon the view of Mr. Justice *Muthusami Aiyar* that Pl. 29 of Chapter I, Section 1, of the Mitakshara is confined to such ceremonies, as if unperformed, would entail a forfeiture of caste or status, and upon the assumption that marriage in the case of a male amongst Brahmins is not included in the initiatory ceremonies (*Samskara*). Reliance is also placed upon a text of Narada (quoted and interpreted in the Smrithi Chandrika) Chapter XIII, Pl. 33 and 34. Before examining this decision

1 (1903) I. L. R. 27 M. 206. 2. (1881) I. L. R. 4 M. 1 at p. 20.
3 (1907) I. L. R. 32 B. 81.

further, it is necessary to point out that amongst Sudras marriage is an initiatory ceremony or *Samskara* and perhaps the most important of all the *Samskaras* performed for them. In commenting on the 2nd hemistich of Verse 10 of the Acharadhyaya of Yajnavalkya rendered by Mandlik thus "their (of the twice-born) ceremonies from conception to the funeral are performed with *Mantras*," the great commentator Apararka observes "that for the Sudra the *Samskaras* are without *Mantras*." He adds on the authority of the Brahmapurana: "But the Sudra shall have the marriage *Samskara* alone. By the use of the word 'alone' either the absence of the *Mantras* or of the previous *Samskaras* is meant. Then there is the alternative for them notwithstanding the injunction." Commenting on the effect of the *Samskaras* dealt with in the first half of Verse 13 of Yajnavalkya rendered by Mandlik thus "In this manner, the sin produced from the seed and the womb is destroyed" (Mandlik page 161), Apararka says this is intended to apply to the four castes, not merely to the twice-born. In the Samskara Mayukha of Nilakanta, the great Bombay authority, the author commenting on the second half of Verse 10 of Yajnavalkya already quoted observes: "By reason of the statement that to them (the twice-born) the ceremonies (from conception to death) are with *Mantras*, it is to be inferred that to the Sudra they are without *Mantras*. Amongst them as he has no study of the Vedas he has not the ceremonies which are incident to it like the *Upanayana* and the *Vedavratas*." The Samskara Bhaskara which is a work of authority on initiatory ceremonies says in Leaf 2 (Bombay Sanskrit Edition, Venkateswara Press): "The sixteen *Samskaras* beginning with *Garbadhanam* are for all. They are accompanied by *Mantras* only for the twice-born" In the Samskara Ratnamala, Volume 39, Anandasrama Series, the author commenting on the same Sloka of Yagnavalkya observes: "It is to be inferred that to the Sudra the ceremonies from *Garbadhanam* to the last rites are without *Mantras.*" He adds: "Yama says, after stating the *Samskaras*, 'but the Sudra should have the *Samskaras* done thus without *Mantra*. Among them those (*Samskaras*) have no application like *Upanayana* and *Kandavratas* which are incident to Vedic study as he has no Vedic study' &c................" Banerjee in his Tagore

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Lectures, First Edition, page 31, speaks of marriage as the only sacrament for women and Sudras. See also West and Buhler, p. 1064, Note (*b*) citing Colebrook's Digest. The foregoing texts are sufficient authority for the position that marriage is a *Samskara* or initiatory ceremony amongst Sudras and as such it ought to be performed in their case. What I have said so far is sufficient for the disposal of the case. But as the decision in *Govindarazulu Narasimham* v. *Devarbhotla Venkatanarasayya*,[1] deals with an issue of great importance as regards the position of the marriage ceremony in the case of the Hindus it is necessary to examine the principles on which the obligatory character of the marriage ceremony rests. There are two paths laid down for the Hindu in the sacred texts, (See Mahadeva Sastri's Bhagavat Gita with Sankara's commentary page 2). One is the path of work or attachment to the things of this world and the other the path of non-attachment or renunciation. The four *asramas* or stages of life are prescribed for the regenerate classes or at all events for the Brahmin. The journey from stage to stage in regular order of succession is contemplated as progress along the path of worldly work. And every Hindu of the twice-born classes has to pass from each stage to the next and until he develops complete non-attachment in the last, the stage of the ascetic, when he prepares himself for final liberation. It is true that it is laid down in the Srutis (see the text of Jabala Upanishad), Volume 29, Anandasrama Series, pages 242 and 243, that if he has conquered his passions and cultivated the feeling of non-attachment he may pass direct without going through the intermediate stages to the *Asrama* of the Sanyasin (See Medhadhithi's Commentaries on Verse 36 of Manu, Chapter VI, and also the Mitakshara on Verses 56 and 57 of the Prayaschittadhyaya of Yajnavalkya, page 309 of the Sanskrit Edition). But except for him who has thus qualified for entry direct into other *Asramas* than that of house-holder the stage of householder is practically compulsory. The twice-born Hindu is not to be a student as long as he chooses. He may remain a *Naishtika Brahmacharin* devoted to life-long studentship under strict conditions. Slokas 49 and 50 of Yajnavalkya, Acharadhyaya, have been translated as follows by Mandlik. "The *Naishtika*

1 (1903) I.L.R. 27 M. 206.

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Brahmacharin is to live near the *Acharya* : in his absence near his son or his wife, or his fire. In this manner the *Bramacharin* using his body, and subduing his senses, attains the world of *Brahma*, and is not born again." I translate the commentary of the Mitakshara on these verses as follows: " In this manner *i. e.*, in the manner stated, *Naishtika*, *i. e.*, one who conducts himself till death, he shall live all his life near his preceptor. He shall not be his own master after the period of receiving instruction in the Veda. In his absence near his son ; in the absence of the latter near his wife, in her absence near the fire; disciplining his body in the manner stated, his senses being controlled, the *Brahmacharin* attains the world of *Brahma*, *i. e.*, achieves deathlessness. Never is he born here again." Apararka, in his Commentary on the same verses at pages 71 and 72 of Volume 46 of the Anandasrama Series, enters into a more elaborate explanation of the two classes of *Brahmacharis*, Upakurvana and Naishtika, the former being one who passes to the stage of *Grahastha* in the ordinary course of life and the latter being one who stays with his preceptor for life under rigid rules of self-discipline. In Chapter II of Manu, Verses 243 to 249 deal with the *Naishtika Brahmacharin*. It is enough to quote the first of those verses in order to indicate that the life of the *Naishtika* is a life of discipline under the teacher for life to qualify for liberation. Verse 243 (Buhler's Translation) says : " But if a student desires to pass his whole life in the teacher's house, he must diligently serve him, until he is freed from this body. " But to the *Upakurvana* or a student who remunerates his teacher to pass on with his leave to the next stage of life Manu has the following injunction. Chapter III verse 2 says : " A student who has studied in due order the three Vedas, or two, or even one only, without breaking the rules of studentship, *shall* enter the order of house-holders." Verse 4 says : " Having bathed, with the permission of his teacher, and performed according to the rule the *Samavarthanam* (the rite on returning home), a twice-born man shall marry a wife of equal caste who is endowed with auspicious bodily marks. " The house-holder's entry into the next stage of Vanaprasatha or the hermit in the forest is thus enjoined. Manu, Chapter VI, Verse (1) says : " A twice-born *Snataka*, who has thus lived according

to the law in the order of house-holders, may, taking a firm resolution and keeping his organs in subjection, dwell in the forest, duly (observing the rules given below) ". The following slokas relate to the entry into the fourth stage namely, that of the ascetic Chapter VI, verses 33, 34, 36 and 37: " But having thus passed the third part of (a man's natural term of) life in the forest, he may live as an ascetic during the fourth part of his existence, after abandoning all attachment to worldly objects. He who after passing from order to order, after offering sacrifices and subduing his senses, becomes, tired with (giving) alms and offerings of food, an ascetic, gains bliss after death. Having studied the Vedas in accordance with the rule, having begat sons according to the sacred law, and having offered sacrifices according to his ability, he may direct his mind to (the attainment of) final liberation. A twice-born man who seeks final liberation, without having studied the Vedas, without having begotten sons, and without having offered sacrifices, sinks downwards." The obligatory character of marriage or entry into the order of householder is thus propounded by Manu with great emphasis. Verses 51 and 52 of Yajnavalkya, Acharadhyaya and also verses 45, 56 and 57 of the Prayaschittadhyaya, (see pages 167, 249 and 250 of Mandlik) enforce the same view. Both the commentators of Manu and the commentators of Yajnavalkya have come to the conclusion after a full discussion of Sruti and Smriti texts that the stage of house-holder is obligatory on all the twice-born. But to those who have pursued the path of non-attachment, *Naishtika Brahmacharya*, or perpetual studentship or entry from studentship into the stage of the hermit or ascetic direct, is open. Some indeed have maintained that there is no warrant for the *Asramas* of hermit and ascetic and that the stage of house-holder is the only one in which a man is at liberty to pass his life. The text of Gautama, Sacred Books of the East. Vol. II, verse 36 at page 193, supports that view. " But the venerable teacher (prescribes) one order only, because the order of house-holders is explicitly prescribed (in the Vedas)". And, in Verse 1 he expresses it as the opinion of "some" that "he (who has studied the Veda) may make his choice (which) among the orders (he is going to enter)". Gautama's view is, however, rejected by Medhathiti and

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Vignaneswara. But that rejection is not to be understood as a sanction to each man to follow which order he likes or to be in no order at all. Marriage is a *Vyavasthitha Vikalpa* or fixed alternative, *i. e.*, compulsory when certain conditions exist (see Jaiminiya Nyayamala, Chapter, 12, Pada 4, Adhikarna 7) and not an *Aichehika Vikalpa* or alternative to be chosen according to pleasure (Jaiminiya Nyayamala, Chapter 12, Pada 3, Adhikarana 4). Except to the man who pursues the path of non attachment to all others the order of a householder is a necessary stage in the journey of life. A person is not justified in being in none of the *Asrams*. Daksha (Manmathanath Dutt's Translation, page 434) says "a twice born person should not live even for a day without following any order. If he lives without following an order he is required to perform a penitential rite." See the Sanskrit text in Volume 48, Anandhasrama Series, page 72. Apararka (Anandhasrama Series, Volume 46) relies on the same text of Daksha. He further adds on the authority of a text whose author is not named : "A man is not fit for Karma, O, King without a wife, whether he is a Brahman, Kshathria, Vaisya or Sudra. The wife is the chief factor for men in the attainment of *Dharma Artha* and *Kama*" which are three out of the four ends of life, the last being final liberation. The stage of the householder is extolled by Gautama in verse 3 of Chapter III, Page 190, Sacred Books of the East, Vol II. "The householder is the source of these, (the four orders) because the others do not produce offspring." Manu expresses the same view. He says in Sloka 78 Chapter III: "Because men of the three (other) orders are daily supported by the house-holder with gifts of sacred knowledge and food, therefore (the order of) house-holders is the most excellent order." In Chapter VI again he returns to the same theme. Verse 87 runs : "The student, the house-holder, the hermit, and the ascetic, these (constitute) four separate orders, which all spring from (the order of) house-holders" Verse 88 "But all (or) even (any of) these orders, assumed successively in accordance with the Institutes (of the sacred law), lead the Brahmana who acts by the preceding (rules) to the highest state." Verse 89 "And in accordance with the precepts of the Veda and of the Smriti, the house-keeper is declared to be superior to all of them; for he supports the other three" (Buhler's (Translation).

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There is again a text of the Yajurv. da which is referred to by the commentators on Manu and Yajnavalkya and which is to the following effect. That a person is born with three debts one of which is to the *pithris* and that debt is discharged by the begetting of offspring. Manu refers to the same rule in Chapter VI verses 35 and 94. Verse 94 says "a twice-born man who, with collected mind, follows the tenfold law and has paid his (three) debts, may, after learning the Vedanta according to the prescribed rule, become an ascetic." Both Medhathiti and Vignaneswara quote the Vedic text in their commentaries on Manu and Yajnavalkya to enforce the view that the stage of householder is compulsory to all who have not attained to the level of non attachment which fits them for perpetual studentship or the stages of hermit and ascetic.

Passing now to the grounds of the decision in *Govindarazulu Narasimham* v. *Devarubhotla Venkatanarasayya*, [1] the first that invites our attention is the statement "nowhere is marriage in the case of a male included in the initiatory cermonies." Having regard to the numerous statements in authoritative works on the *Samskaras* that marriage is an essential *Samskara* it is perfectly plain the learned pleaders who argued the case failed to draw the attention of the learned Judges to such texts. Mr. Mayne says: "A Hindu marriage is the performance of a religious duty. *Hindu Law*, page 108. Banerjee says in his Tagore Lectures First Edition, page 30: "It is regarded as one of the ten *Samskaras* necessary for regeneration of men of the twice-born classes." West and Buhler say [page 873 note (*f*)] "marriage is a *Samskara* that is strongly enjoined." The Samskara Mayukha the Samskara Bhaskara and the Samskara Ratnamala, all of them authoritative treatises on the *Samskaras* but none of which has yet been translated into English, deal exhaustively with the *Samskaras.* Marriage is there shown by them to be among the most important. See the Samskara Mayukha leaf 6, Samskara Bhaskara leaf 2, and the Samskara Ratnamala pages 2—5, Anandasrama Series, Volume 39. These works show that according to Gautama the *Samskaras* are forty of which marriage is one. According to Angiras they are twenty-five including marriage. According to Asvalayana and others they are sixteen and marriage is among the number. The Samskara Ratnamala quotes

1. (1903) I. L. R. 27 M. 206.

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the sages in full and points out at page 6 the fruit of the several *Samskaras.* As regards marriage, "the fruit of the Samskara is stated to be the discharge of the debts to the Gods and the Pitris—."The learned Chief Justice in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya,*[1] refers to the opinion of Colebrooke at page 301 of Volume II of Jagannadha's Digest and also to the note in Stokes, H. L. Books, at page 398, and observes:"We cannot find that Mr. Colebrooke had any sufficient authority for including marriage among the ceremonies necessary to perfect the class of a twice-born." This statement would no doubt be correct if it was intended to mean that in order to become a twice-born person marriage is not a necessary condition. But Mr. Colebrooke does not say and it is not necessary for the purpose of establishing the obligatory character of marriage to say it, that marriage is a necessary condition to make a person twice-born. All that he says is that marriage is among the obligatory *Samskaras.* The eight ceremonies or *Samskaras* he refers to, are also those that are prescribed for girls as made without *Mantras.* See leaf 2, Samskara Bhaskara. He includes marriage as an additional *Samskara* on the authority of Jagannadha himself who speaks of ten *Samskaras* at page 254 of the Digest. There is also another reason for separating marriage from the *Samskaras* that precede it, for as pointed out at page 300 of the Digest it is not a *Samskara* which a father does for the sons as he does in the case of the preceding *Samskaras* but one in which the son himself participates as the active agent. Stress has been laid on the text of Narada in Chapter XIII. Verse 32 is as follows: "Or, no paternal wealth being left, the initiatory ceremonies must be invariably performed for their brothers by those previ ously initiated contributing the required funds for their own portions." The Smriti Chandrika no doubt in Pl. 41 of Chapter IV quotes this verse as prescribing the rule in case there is no patrimony and adds the comment in Pl. 42 " that the ceremonies contemplated by this text commence in *Jatakarma* and end in *Upanayana.*" The marriage of an unmarried brother is certainly not a duty cast on the married brothers when there is no patrimony. And the limitation of Verse 34 of Narada's text in

1. (1903) I.L.R. 27 M. 206.

the particular case of no patrimony to the ceremonies that end with *Upanayana* does not justify the inference that the author of the Smriti Chandrika regarded marriage as a *Samskara* which was not obligatory. Dr. Jolly's note which is perfectly correct with reference to the comment of the Smriti Chandrika is perhaps appended by mistake to Verse 34. There is no note under Verse 34 and it may be Dr. Jolly's observation is not applicable to the case put in Verse 33 of Narada. But, however, this may be there can be no doubt that the Smriti Chandrika is no authority for the position that marriage is not an obligatory *Samskara*. There remains one important matter to be noticed. I have not been able to find on what authority Mr. Justice *Muthusami Iyer* based his observations in *Ponnappa Pillai* v. *Pappuvayyangar*[1] that the phrase "the like" in Pl. 29 Mitakshara Chapter I, Section I, refers only to such ceremonies as if unperformed would entail a forfeiture of caste. The discussion in the Mitakshara from Pl. 17 to 29 is with reference to the question whether property arises by birth or by partition. As usual with the author he first propounds the problem, see Pl. 17. He states the argument of the opponent strengthening it by apt quotations in Pl. 18—22. In Pl. 23—26 he states his argument in answer to the opponent's view and in Pl. 27 his conclusion, namely, that property is by birth. Some texts apparently inconsistent with this view are explained away as referring to particular exceptions, Pl. 27 after stating the conclusion explains the text showing that the father has greater power than the mere holder of a joint interest as applicable to moveables. Another text which deals with a single member's power over immoveables is explained as confined to exceptional cases. There is no reference in Pl. 28 to the single member being the manager. But the text, however, is generally cited as dealing with the powers of a manager. The explanation of that text in Pl. 29 (Colebrooke's Translation) is as follows: "While the sons and grandsons are minors, and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated; even one person, if capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it, or the support of the family renders it necessary, or indispensable duties,

1. (1881) I. L. R. 4 M. 1. at page 17.

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such as the obsequies of the father or the like, make it unavoidable." The words in the Mitakshara which have been rendered into English by Colebrooke by the clause "or indispensable duties such as the obsequies of the father or the like make it unavoidable" are simply अवश्यं कर्तव्येषु पितृश्राद्धादिषु. They simply mean "father's *shradha* etc., which have to be necessarily done." It will be noticed that Mr. Colebrooke has, by using the words "indispensable" and "unavoidable," added to the stringency of the condition under which an alienation is permissible. The word '*Adi*' which is translated "or the like" means beginning with and merely indicates that the father's ceremony which is named is one out of a group of ceremonies. There is no implication that forfeiture of caste is a consequence of a failure to perform the obsequies and that a similar consequence flows from a failure to perform other ceremonies which are grouped together with the obsequies of the father. If we dismiss the idea then of forfeiture of caste as the penalty which must characterise the class of ceremonies for which the immoveable property of the family may be alienated by the manager there is nothing in Pl. 29 of the Mitakshara which prevents our holding that a debt borrowed for defraying the expenses of the marriage of the son is recoverable from the family property as having been incurred for a family purpose in a case of necessity. The importance of the marriage ceremony in the case of every Hindu, subject to the exceptions already noticed, is so well recognised by Mitakshara that in the commentary at page 416 on Sloka 289 of Yajnavalkya, Vignaneswara observes. "Harita says a person who is in no *Asrama* (after leaving studentship) for a year shall perform *Prajapatya Krichra* and enter the (next) *Asrama*. After the second year the penance of *Athi Krichra*; after the third *Krichrathi Krichra*; beyond that *Chandrayana*. This is in case (the *Asrama*) is not available. But if available ordinarily the purifications prescribed for *Upapatahkas* should be ordered according as the abstention was intentional or not." It is unnecessary for our present purpose to explain these expiatory rites. The above passage from the Mitakshara is decisive of the obligatory character of the Marriage ceremony. This passage is quoted in Leaf 199 of the Samskara Bhaskara with approval. I have therefore no hesitation in holding that the marriage of the 2nd

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defendant for which the loan was contracted by the 1st defendant and the mortgage executed was a proper family purpose and the 3rd defendant's interest in the mortgaged property is consequently liable for the mortgage debt. I would set aside the decree of the Subordinate Judge as regards the 3rd defendant and restore that of the District Munsif. I make no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

The Secretary of State for India in Council represented by the Collector of Trichinopoly	..	Appellant* (*Defendant*)
v.		
Muthu Veeran Reddi	..	Respondent (*Plaintiff*).

Secretary of State v. Veeran Reddi.

Government and ryotwari holder—Repair of irrigation works—Right of suit for damages caused by Government's non-repair—Statute—Construction.

Government is not under an obligation with regard to each individual ryot to repair irrigation works whenever they require repair ; and a ryotwari holder has no right of suit for damages against Government in respect of loss incurred by him owing to failure of water caused by the non-repair.

[*Madras Railway Company* v. *Zemindar of Karvatenagram*,[1] explained.]

No liability arises in cases of non-feasance by the mere imposition of a duty by a statute, in the absence of an imposition of the liability itself either expressly or by clear implication by the statute itself.

Appeal from the decree of the District Court of Trichinopoly in A. S. No. 135 of 1908 presented against the decree of the Court of the District Munsif of Kulitalai in O. S. No. 684 of 1905.

This was a suit to recover Rs. 120 from the Government. Plaintiff alleged:—(1) That the irrigation tank of his village which was usually supplied with water diverted to it by an ancient dam across a stream was not so supplied with water owing to the dam having become largely broken up and become low; (2) that his lands which were for a long

* C.M.A. 68 of 1909. 11th March 1910.

1. (1874) 1 I.A. 864.

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time irrigated with the water of the said tank could not be cultivated in fasli 1314 as there was no water in the tank owing to the persistent negligence of the defendant's officers in the matter of effecting repairs to the dam; (3) that although there were floods in fasli 1314 water could not be stored owing to the dam being broken; (4) that the defendant was bound to supply his mamool wet lands with sufficient quantity of water to enable him so to cultivate; (5) that the defendant was bound to keep the said dam in proper repair, and (6) that he (the plaintiff) lost Rs. 120, the value of the crops which he would have raised in case there was water in the tank.

The defendant, without denying allegations (4) and (5) above-noted, simply denied (1) that there were floods in the said fasli; (2) that the delay in effecting repairs to the dam was due to his negligence, and (3) that any loss accrued to the plaintiff.

The first issue was "whether the defendant has been guilty of negligence, if any, in not repairing the dam"; the second issue was "if so, did the plaint tank receive no supply of water from the river owing to such negligence or were there not sufficient freshes or floods in the year; the third issue "was whether the plaintiff incurred any loss and, if so, was the defendant's negligence, if any, the immediate or remote cause of such loss", and the fourth issue was "what damages, if any, is the plaintiff entitled to recover?"

The Munsif dismissed the suit holding that though the duty to repair was not specifically denied *in toto* no suit would lie to compel the Government to maintain any work of irrigation, and that such matters must be left to the wise discretion of the Government. The appellate Court reversed the decree and remanded the suit for trial, holding that the Government was bound to maintain old works of irrigation. Against this order of reverseal and remand the Government filed this appeal.

The Advocate-General (P. S. Sivaswami Aiyar) for the appellant (defendant).

N. Rajagopalachari for respondent (plaintiff).

The Advocate-General.—The Government is not legally bound to maintain any works of irrigation either by statute or by contract. It is only morally bound. It is liable only for mis-feasance in connexion with existing works and not for non-feasance. There is no contract express or implied between the Government and the ryot with regard to supply of water. If there is water and if water is supplied the Government will levy water-rate, otherwise the ryot will pay dry rate. The right which a ryot has got for any quantity of water is only as an easement and it is purely of a negative character—See S. 27 of the Easements Act. Though the Government is only morally bound to maintain irrigation works any one who derives his title may be legally bound to do so, *e.g.*, a zemindar. That is how we ought to understand *Madras Railway Coy.* v. *Zemindar of Karvetnagaram.*[1] For moral obligation ripening into a legal obligation see *Rangammal* v. *Echammal*[2]. *Sankaravadivelu Pillai* v. *Secretary of State*[3], *Rama Oodayan* v. *Subramanya Aiyar*[4], *Ramachandra* v. *Narayanasawmi*[5] and *Chinnappa Mudaliar* v. *Sikka Naicken*[6] are cases of only mis-feasance and not of non-feasance, The duty to maintain, if any, is like that of statutory bodies—vide *Madras Railway Coy.* v. *Zemindar of Karvetnagaram*[1]. In such cases it has been held that no suit at the instance of an individual will lie—*Sanitary Commissioners of Gibraltar* v. *Orfila*[7]; not liable for non-feasance) *Ceroly* v. *Newmarket Local Board*[8]; (no duty to repair) *Municipality of Picton* v. *Geldert*[9]; (not liable unless legislature expressly says so) *Municipal Csuncil of Sydney* v. *Bourke*[10]. Nobody has ever heard of such a suit as this till now. The obvious inconvenience that will result to Government by holding the existence of such duty shows the reason for there being no such right on the part of the ryot.

N. Rajagopalachari:—Government is under a duty to maintain ancient and existing works of irrigation—*Madras Railway Coy.* v. *Zemindar of Karvetnagaram*[1]; *Sankara Vadivelu* v. *Secretary of State*[3] (duty to maintain existing works is imperative)

1. (1874) 1 I.A. 364.
2. (1898) I.L.R. 22 M. 305.
3. (1904) I.L.R. 28 M. 72.
4. (1908) I.L.R. 31 M. 171.
5. (1892) I.L.R. 16 M. 333.
6. (1900) I.L.R. 24 M. 36.
7. (1890) 15 A.C. 400.
8. (1892) A.C. 345, 351, 352.
9. (1893) A.C. 524, 529.
10. (1895) A.C. 433 at 444.

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Fisher v. *Secretary of State for India*[1] ("it cannot be contended at this time of day that Government is not bound to maintain works of irrigation.") Vide also pp. 373 to 375 and 377 *in Madras Railway Co.* v. *Zemindar of Karvetnagaram*[2] embodying the opinion of the Madras High Court as to there being a duty on the part of the Government. The above cases show that the duty is not moral but legal. It is in that way the decision in *Madras Railway Co.* v. *Zemindar of Karvetnagaram*[2] has been understood by text-writers, (*e.g.*) PEACOCK on *Easements*, 2nd Edition, p. 255. The above decisions point out that the conditions of this country which are purely agricultural require the existence of such a duty. They also show that agricultural people settled near permanent works of irrigation " on the faith of such works" ; *vide* also *Ponnusawmy Tevar* v. *Collector of Madura*[3]. From these we may infer an implied contract to continue the supply of the customary quantity of water necessary for each ryot's use. The matter is not one of easement as has been laid down in *Ponnusawmy Tewar* v. *Collector of Madura*[3] ; *Krishna Ayyar* v. *Venkatachala*[4]. The true theory is that laid down in *Chinnappa Moodaliar* v. *Sikka Naikan*[5], *viz.*, *contract*. That view has not been overruled though Sir *S. Subrahmanya Aiyar* in *Sankara Vadivelu* v. *Secretary of State*[6] hinted that it is more a proprietary right than a mere right *in personam*. Even that need not necessarily be an easement. *Ponnusamy Tevar* v. *Collector of Madura*[3] talks of '*conveyance* of water' at p. 30. The 'contract' theory has recently been approved of in *Rama Oodayan* v. *Subramania Aiyar*.[7] When decisions talk of duty and right they mean only legal duty and legal right and not moral ones unless they expressly say so. Moral duty ripening into a legal duty is to be found only in the law relating to Hindu Law of Maintenance and that too only in recent times. In the case of *Madras Railway Co.* v. *Zemindar of Karvetnagaram*,[2] in showing how the Zemindar is bound to maintain existing tanks, the Privy Council says that the Indian Government from whom he derived his liability was itself bound to maintain such tanks. If Government is not responsible for non-feasance but only for

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1. (1908) I.L.R. 32 M. 141 at pp. 155, 158.
2. (1874) L.R. 1 I.A. 364.
3. (1869) 5 M.H.C.R. 6 at pp. 29, 30.
4. (1872) 7 M.H.C.R. 60.
5. (1900) I.L.R. 24 M. 36.
6. (1904) I.L.R. 28 M. 72.
7. (1908) I.L.R. 31 M. 171.

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misfeasance the Privy Council could easily have exempted the Zemindar in that case on that ground for the damages caused by the breach of his tank and need not have gone to see whether he took all the necessary precautions and whether he was not liable in that case owing to *vis major*. Whatever might be the ground, decisions from the earliest times, *e.g.*, *Ponnusami Tevar* v. *Collector of Madura*[1] down to today, viz., *Fischer* v. *Secretary of State*[2], have established that the Government is bound to supply the ryot with the usual quantity of water necessary for his purposes. If so the Government is bound to use all means in their power to see that that water is supplied. Then 'non-feasance' will not exempt them. If there is a contract it is clear that 'non-feasance' is no excuse. The fact that no such action has till now been laid down does not show that there is no such right; *e.g.*, cases which have recently allowed processions of low-caste people in the streets of high-caste men. If there is a right in the ryot and a duty on the part of the Government, the amount of inconvenience resulting to the latter by such suits being allowed is no ground for disallowing them. The analogy of statutory bodies was laid down in *Madras Railway Coy.* v. *Zemindar of Karvetnagaram*[3] only to show the imperative character of the duty to maintain certain works and not to the maintainability of suits at the hands of individuals. Such an analogy will not hold here, for there is no statutory duty here imposed. Moreover, in the cases quoted from English Appeal cases an indictment against the statutory bodies was possible under the statutes creating them, and when one remedy is pointed out that alone must be resorted to; moreover, some of those cases actually say that the statutes creating the bodies did not *specifically* give a right of action for an individual aggrieved. Here no indictment is possible against Government. Moreover if there is a contract with each ryot, then each ryot can sue for breach thereof unless there is something to bar him from doing so.

The Advocate-General replied.

The Court delivered the following

JUDGMENT:—The plaintiff alleges that a certain caligulah which regulated the supply of water for irrigation to his

1. (1869) 5 M.H.C.R. 6 at p.30. 2. (1908) I.L.R. 32 M. 141.
3. (1874) 1 I. A. 364.

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land had fallen into disrepair, and the Government officers, being bound to repair it, failed to do so. In consequence of this failure his land received no water and his crop was lost. He sued for compensation to the extent of the value of the crop which, but for the failure of the water-supply, he might have got.

Both Courts below have considered the question whether the plaintiff has a cause of action against the Government, and though the written statement does not distinctly raise this question, we have dealt with it. In the circumstances, we are of opinion that the District Munsif was right and that the Government is not under an obligation with regard to each individual ryot to repair irrigation works whenever they require repair. There is no case, so far as we know, in which a claim like the present has ever been made in India, whether against the Government or against a Zemindar, though opportunities for such claims have been sufficiently frequent ever since a system of irrigation works was inaugurated in the country. The Courts in this Presidency have held that a ryot is entitled to prevent the Government from doing any act resulting in a material diminution of the usual supply of water for irrigation to his land, but it has never yet been held that an action will lie for mere failure to repair, when repair is required to enable the ryot to receive the usual supply. For the respondent reliance is placed on *Madras Railway Company* v. *Zemindar of Karvatenagaram*[1], but that case does not help him. It may very well be—it is a question which we need not decide—that the Government when handing over large tracts of the country to Zemindars at the Permanent Settlement laid upon them an obligation to preserve and repair the irrigation works handed over to them at the same time, and consequently, that there may be on a Zemindar an obligation more onerous than any that is upon the Government, and that what is discretionary in the Government has been made by the Government obligatory in the case of the Zemindar. But, however that be, we have to remember that what the Privy Council had to decide was not a question as to the extent of the obligation, if any, to maintain the works, but a question whether the rule laid down by the House of Lords in *Fletcher* v. *Rylands*[2] could properly be applied so as to make a Zemindar liable for damage done by the breaching of an irrigation tank maintained by him. In discussing the question their Lordships observe that the Govern-

1. (1874) 1 I. A. 364. 2. (1868) L. R. 3 H. L. 330.

ment of India have undertaken the public duty of maintaining what may be called a national system of irrigation essential to the welfare of a large portion of the population, and that this public duty has in some cases devolved upon Zemindars, who cannot do away with the irrigation works in which many persons are interested, but are charged by Indian Law, by reason of their tenure, with the duty of preserving and repairing them. These considerations are advanced to demonstrate the difference between the position of a Zemindar and that of the defendants in *Fletcher* v. *Rylands*[1]. That is to say because the Zemindars are under an obligation to preserve and repair these tanks as a part of the public duty undertaken by the Government, they cannot be held liable for damages caused by the accidental destruction of one of those tanks. The Zemindar's position is further likened by their Lordships to that of a person or corporation on whom statutory powers are conferred and statutory duties imposed.

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Their Lordships had not to decide, and did not decide, the extent of the duty undertaken by the Government and cast upon the Zemindar, and if we consider the suggested analogies, we find that it has never been held that a person bound by reason of his tenure to keep a way in repair is liable to an action by individuals injured by his failure to do so—vide *Young* v. *Davis*[2] and *Rundle* v. *Hearle*[3]—while as regards persons and corporations on whom statutory powers have been conferred and statutory duties imposed the rule derivable from the English cases seems to be that in the absence of a common law liability as regards individuals, no such liability arises in cases of non-feasance merely because the statute imposes duty; the statute must impose the liability expressly or by clear implication.—vide *Saunders* v. *Holborn District Board & Works* [4] and the cases therein cited; also *Municipal Council of Sydney* v. *Bourke*[5]. It is clear then that there is nothing in their Lordships' judgment which requires us to decide that a Zemindar is under an obligation to a ryot to keep a tank in repair, or, failing that, to pay the value of the crops which the ryot might have raised. That question was outside the case before their Lordships, and if their observations are to be taken as dealing with it at all they amount only to this, that the extent of the public duty which lies on the Zamindar is to be ascertained on the analogy of those public duties cast upon

1. (1868) L.R. 3 H.L. 330.
2. (1862) 7 H. and N. at 772.
3. (1898) 2 Q. B. at 88.
4. (1895) 1 Q. B. 64.
5. (1895) A. C. 433.

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persons or corporations by reason of tenure or by statute and the analogies, as we have shown, do not assist the respondent.

As pointed out by *Subrahmanya Aiyar* J. *in Sankaravadivelu Pillai* v. *Secretary of State for India in Council* [1] the rights and obligations of the Government in the matter of irrigation works in this country have to be ascertained from unrecorded custom and practice rarely brought before the Courts, and, as we have already said, we have no case in which a ryot has claimed payment for his crops lost owing to non-repair of an irrigation work. The ryot's payments of revenue being based on a division of the crop between him and the Government, when the crop fails there is nothing to divide, and, so far as we know, no ryot has hitherto thought of claiming more than this, that when the crop fails for want of water the land tax shall be remitted.

It is unnecessary to decide whether a ryot has a right to claim this remission when the failure of water-supply is due to neglect to maintain a work of irrigation, but it cannot be denied there is no custom or practice recorded or unrecorded in this Presidency under which a ryot receives compensation from the State or a Zemindar measured by the value of the crop lost owing to defects in the irrigation works which command his land.

The application, therefore, of *Subrahmanya Aiyar's* test is of no assistance to the respondent, and we have to see whether without the aid of custom or practice, we can hold that there is in any way imposed on the State the liability which the respondent seeks to enforce.

It is argued that in the case to which we have referred (*Sankaravadivelu Pillai* v. *Secretary of State for India in Council*[1]) *Subrahmanya Aiyar* J. has decided that the duty of the Government to maintain existing works of irrigation is an imperative as opposed to a permissive obligation, and that the liability to compensate individual ryots is to be inferred from the imperative nature of the duty. But the observations of the learned Judge are not to be considered without reference to the case which he was deciding when he made them, and it is clear from the context that his use of the word 'imperative' was intended only to show that in maintaining existing irrigation works the Government, in the absence of negligence, are not responsible for injury caused by the execution of the operations undertaken in pursuance of the duty. In the English cases to which reference has already been made, the learned Judges have remarked on the

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1. (1904) I. L. R. 28 M. 72.

inconvenience which would be caused if every person injured by non-feasance on the part of a body or a person entrusted with a public duty were entitled to come into Court with a demand for compensation for his own particular grievance, and this argument is particularly applicable to the present case where the public duty is that of maintaining, out of public funds, a national system of irrigation over an area so extensive as British India. It is true that only a limited number of persons own land under any given tank or other irrigation work and the case is therefore not entirely on all fours with highway cases where the number of possible sufferers is unlimited, but the difference is merely one of the degree of inconvenience, and does not make the argument inapplicable generally.

It was also argued for the respondent that the Government is liable as for breach of contract, and in support of this contention reliance was placed on *Chinnappa Moodaliar* v. v *Sikka Naikan*[1]. That case, no doubt, decides that the ryot's right to a supply of water for irrigation is founded on contract, but that decision has been doubted in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*[2] by *Subrahmanya Aiyar* J. who holds that it goes too far in treating the irrigation rights of ryotwari owners as rights *in personam* and that those rights ought, on principle and authority, to be held to partake of the nature of rights *in rem*. The learned Judges in *Chinnappa Moodaliar* v. *Sikka Naikan*[1] cite *Krishna Aiyan* v. *Venkatachala Mudali*[3] in support of their view, but that decision is based on a view of the relationship between the Government and the ryots which is not now generally accepted—the view that the ryot holds his land of the Government as a tenant from year to year. The other case referred to in the same judgment, *Ramachandra* v. *Narayanaswami*[4], suggests that the view taken by *Subrahmanya Aiyar* J. was that held by the Court though the nature of the liability of the ryot who then interfered with the irrigation channel is not expressly laid down. *Chinnappa Moodaliar* v. *Sikka Naikan*[1] does not lay down the conditions of the supposed contract, and, as the authorities stand, we are not prepared to hold that the Government is bound by a contract with the plaintiff to maintain a supply of water for the irrigation of his land.

We think the plaintiff has no cause of action and we reverse the decree of the District Judge and restore that of the District Munsif dismissing the suit. The plaintiff must pay the defendant's costs throughout.

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1. (1900) I. L. R. 24 M. 36.
2. (1904) I L. R. 28 M. 72.
3. (1872) 7 M. H. C. R. 60.
4. (1892) I. L R. 16 M. 333.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Muthu Payal *alias* Muthu Nadan .. Appellant*

v.

Nagalingam & others .. Respondents.

Muthu Nadan v. Nagalingam

C. P. C. (Act XIV of 1882), S. 561—*Memo of objections—costs.*

Memorandum of objections filed under the old Code (of 1882) cannot be pressed if the original appeal itself is not heard† ; and the respondent is not, as a matter of right, entitled to his costs on his memorandum which has proved futile.

Second appeal from the decree of the Court of the Subordinate Judge of Madura (East) in A. S. No. 111 of 1906, presented against the decree of the Court of the District Munsif of Mana Madura in O. S. No. 302 of 1904.

C. V. Anantakrishna Iyer for appellant.

S. Srinivasa Aiyangar and *M. Narayanasami Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The appellant's Vakil says he has no instructions. The party does not appear. The second appeal is dismissed for default with costs.

The second appeal having been dismissed for default, the respondent presses his memorandum of objections. It is admitted that such a memorandum under the old Code of Civil Procedure cannot be argued. It is not a memorandum under rule 22 of order XLI of the New Code. In C. M. A. No. 124 of 1908 the question was not argued. We must, therefore, disallow this memorandum of objections. But the respondent says he is entitled to his costs on the authority of Appeal Suit No. 208 of 1905. All that that case decided was that the Court had jurisdiction to allow costs upon such a memorandum. That case does not compel us to hold that the respondent in every such case is entitled to the costs of his memorandum. In this case we are not satisfied we should allow costs on the memorandum. The memorandum of objections is dismissed.

[† See also S.A. 222 of 1909 which is to the same effect on the first point.]

*S. A. No. 900 of 1907, 26th January, 1910.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

Vibudapriya Thirthaswami & others .. Apellants*
v. (*Plaintiffs*)

Esuf Sahib and others .. Respondents
(*Defendants*).

Vibudapriya Thirthaswamy *v.* Esuf Sahib.

Highway—Dedication—Presumption—Restricted dedication — Dedication by Trustee of Hindu Temple—Presumption in favour of reservation against Mahomedan procession, with music—Procession not an excessive user of the highway—Ownership in patta lands and non-patta lands.

Dedication must be presumed from user as a highway, whoever was the owner of the soil at the time of dedication. A general user in the case of a public highway would throw the burden of proving a reservation upon the person contending for it, the presumption being in favor of a dedication without reservation if that be possible.

Marching in procession is not an excessive user of a highway.—[*Sadagopachari* v. *Krishnaswamy Rao*[1] referred to and declared as overruling the *dicta* of *Bhashyam Aiyangar* and *Subrahmanya Aiyar* JJ. in *Vijiaraghavachari* v. *Emperor*[2].]

Obiter:—Property vested in trustees cannot be presumed to have been dedicated as a high-way where such dedication would be contrary to the trust. But where the dedication itself as a highway is established and there is no evidence to show that the trustees (in this case, of a Hindu Temple) would have been acting contrary to the trust in dedicating the way to the public without reservation as to procession by the Mahomedans with music, the presumption in favour of a general dedication without reservation is unrebutted. A presumption will arise in favour of a restricted dedication if it be clearly proved that an unrestricted dedication by the trustees is illegal.

Question of relative ownership of the Government and the ryot in the soil of pattah lands and non-patta lands dwelt upon.

Appeal from the decree of the Subordinate Judge's Court of South Canara in O. S. No. 44 of 1904.

P. R. Sundara Aiyar, *K.N.Aiya* and *B. Sitarama Rao* for appellants.

K. Narayana Rao for respondents.

P. R. Sundara Aiyar for appellants.—Right of way is acquired by the public by reason of dedication and not by any grant or prescription—DILLON, *Municipal Corporations*, p. 750 *et. seq*; *Encyclopœdia of the Laws of England*, Vol. vi., p. 184;

* A. No. 81 of 1906. 5th September 1910.

1. (1907) I. L. R. 30 M. 185 (P.C.) 2. (1902) I. L. R. 26 M. 554.

Vibudapriya Thirtha-swamy v. Esuf Sahib.

Turner v. *Walsh.*[1] Incapacity to dedicate precludes the possibility of dedication; consequently acquisition of right by the public. It is incompetent to trustees of a Hindu temple to dedicate the way to the public in the manner they are alleged to have done in this case. The way being within one of the prakarams of the temple, even supposing that the temple authorities can dedicate, dedication for purposes of procession with music ought not to be presumed. For incapacity to dedicate see PRATT on *Highways* p. 23; *Rex* v. *The Inhabitants of Leake*[2]; *Grand Junction Canal Co.* v. *Petly*[3]; *Mulliner* v. *Midland Railway Company*[4]. Under such circumstances no *animus dedicandi* which is necessary (*Poole* v. *Huskinson*[5]) can be presumed. Extent of dedication is measured by extent of user—*Ballard* v. *Dyson*[6]. Inconvenience to the owner by dedication is ground for presuming against dedication—*ibid.* The fact that dedication would be a breach of trust is also a reason for not presuming dedication; for circumstances that would rebut dedication—see PRATT, p. 35. One act of interruption is more valuable than any amount of acquiescence—*Poole* v. *Huskinson*[5]. This is not a case governed by the Privy Council decision in *Sadagopachariar* v. *Krishnasawmy Rao*[7]. The road has been found to be the private property of the temple. Such being the case, the road never vested in the Taluk Board. See Sections 3 (23) 49, 53 of the Local Boards Act and S. 8 of Act III of 1871.

K. Narayana Rao, for respondents, contended that the road vested in the Local Board and that it was not incompetent for the trustees to dedicate. There was nothing inconsistent in it with the purpose of the temple; at any rate the fact of processions having been taken being admitted, the qualification as to music was for the plaintiffs to prove, which they have not. He contended also that the restriction placed by the Court below on the defendants' right to carry procession during puja hours was an unnecessary and unwarranted restriction.

P. R. Sundara Aiyar, in reply, referred to *Sheshayyangar* v. *Sheshayyangar*[8] in support of the restriction by the Court below.

1. (1881) 6 A. C. 636.
2. (1833) 5 B. and Ad. 469, S. c. 39 R. R. 521.
3. (1888) 21 Q. B D. 273.
4. (1879) 11 Ch. D. 611.
5. (1843) 11 M. and W. 827; s. c. 63 R. R. 782.
6. (1808) 9 R. R. 770.
7. (1907) I L. R. 30 M. 185
8. (1889) I.L.R. 2 M. 143.

The Court delivered the following

Vibudapriya Thirtha-swamy v. Esuf Sahib. — Krishna-swami Aiyar J.

JUDGMENTS:—*Krishnaswamy Aiyar* J:—The plaintiffs are trustees of a Hindu temple. They have instituted the action to restrain the defendants, who represent the Mahomedan inhabitants of Udipi, by means of a permanent injunction from marching in procession through the portions marked III-A and III-B in the plan, Exhibit WWW. The Subordinate Judge has given them a decree as prayed for as regards III-B. The defendants made no claim to go in procession along III-B, and, as the respondents in the appeal before us, no attempt was made by them to object to that portion of the decree. As regards III-A, the Subordinate Judge has restrained the defendants from going in procession with music and reciting prayers while religious worship is going on in the plaintiffs' temple. Mr. Sundara Aiyar who argued the case for the plaintiffs, who are the appellants before us, did not contest the right of the defendants to go in procession along III-A. But he argued against their right to go in procession with music or repeating prayers at any time along III-A, whether worship was or was not carried on in the Hindu temple. Mr. Narayana Rao, for the respondents, objected to the Subordinate Judge's decree restricting their right to go with music and reciting their prayers, to hours when there was no worship going on in the Hindu temple. The right to go in procession with music was the principal bone of contention before us. No serious effort was made to impugn the finding of the Subordinate Judge that III-A belongs to the temple. We are not prepared to dissent from that finding. In addition to the evidence detailed by the Subordinate Judge we may advert to the fact disclosed by the plan and the evidence of the plaintiffs' witnesses Nos. 2 and 4 that there are traces of an old temple wall outside the limits of the street in question and on three sides of it. Starting then from the position that the subsoil of III-A vests in the temple, the next question is what rights the public have over the surface. III-A is a part of the big trunk road leading from Mangalore to Kalyanpur. It was the only road between those places till the coast road was opened less than forty years ago according to the plaintiffs' second witness. It is not in evidence when III-A was laid out. Its origin is lost in antiquity. The public has used it as a thoroughfare from

Vibudapriya Thirtha-swamy v. Esuf Sahib.

Krishna-swami Aiyar J.

time immemorial. Dedication must be presumed from the user as a highway, whoever was the owner of the soil at the time of the dedication. *Regina* v. *East Mark Tything*[1], and *Turner* v. *Walsh*[2] decide that the Crown is no exception. There is no evidence in this case of dedication by the trustees of the temple. The general *prima facie* presumption of law in England is that the freehold of the road *ad medium filum* is in the proprietors of land on either side (see *Haigh* v. *West*[3] and *London & North Western Railway* v. *Westminster Corporation*[4]) and that when the road was originally formed the proprietors on either side each contributed a portion of his land for the purpose —*Holmes* v. *Bellinghan*[5] and *In re White's Charities*: *Charity Commissioners* v. *The Mayor of London*[6]. This rule is carried out so far in England as to raise the presumption that the waste land on each side of the road is the property of the adjoining owners—*Steel* v. *Prickett*[7] and *Doe dem Pring & another* v. *Pearsey*[8]. These presumptions are based upon the fact that property in land vests in private owners. Dedication therefore of a highway under the Common Law arises by the act of the private owner of the soil. It may be open to question how far these principles have any application to India where it is not the accepted theory that the property in land for which patta is issued is in the grantee of the patta from the Government more than in the Government itself—*Mobarak Shah* v. *Toofany*[9]. (See, however, *Balbir Singh* v. *Secretary of State for India for Council*[10].) In the case of waste lands at all events not included in a patta in ryotwari tracts the property has unquestionably been treated as vesting in the Government. There is no reason to suppose that the dedication of III-A was originally made by the trustees of the temple rather than that a common owner of the site of the temple and of the road founded the temple and gave it the site and dedicated the highway to the public. The argument of Mr. Sundara Aiyer assumed that the trustees of the temple

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1. (1848) 17 L. J. Q. B. 177 S.C. 75 R. R. 653.
2. (1881) 6 A. C. 636.
3. (1893) 2 Q. B. 19 at 29.
4. (1902) 1 Ch. 269.
5. (1859) 29 L. J. C. P. 132 at p. 134.
6. (1898) 1 Ch. 659 at 666.
7. (1819) 2 Stark 463.
8. (1827) 7 B. & C. 304.
9. (1878) I.L.R. 4 C. 206
10. (1899) I. L. R. 22 A. 96.

Vibudapriya Thirtha-swamy v. Esuf Sahib.

Krishna-swamy Aiyar J.

must have dedicated the highway. He then proceeded to contend that it was upon the defendants to show that the dedication was unrestricted, *i.e.*, without any reservation; that an unrestricted dedication ought not to be presumed as that would be contrary to the powers of trustees of a Hindu temple who could not make a grant injurious to the interest of the temple; and that, if there was a dedication without reservation, it would be invalid as contravening the purposes of a Hindu religious foundation like the temple in question. Although the nature of the user is the only basis for determining the extent of the dedication a general user in the case of a public highway would throw the burden of proving the reservation upon the person contending for it. The law would not restrict the public to the exact mode of user of which there was evidence requiring the party pleading an unrestricted right to establish it. In *Ballard* v. *Dyson*[1] Chief Justice *Mansfield*, distinguishing between a public highway and private way, observed that in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for cattle as well as carriages. In the case of a private way, however, he was of opinion that where there was no grant, usage alone indicated the extent. Although it seems to be the better opinion at the present day that there may be a partial dedication of a highway, limited as to time or as to the extent of the user though not to a part of the public (see GLEN on *Highways*, pp. 38, 39, *Poole* v. *Huskinson*[2] and *Marquis of Stafford* v. *Coyney*[3]) there is no instance in which the public being entitled to use the highway at all times and men and cattle and carriages being entitled to pass and repass, any restriction was imposed on the manner of passing along the highway. It is true a highway is for passing and repassing, and it may amount to a trespass to use it for other purposes. See *Regina* v. *Pratt*[4]; *Harrison* v. *Duke of Rutland*[5]; *Hickman* v. *Maisey*[6]. Mr. Sundara Aiyar has not attempted to argue that marching in procession is an excessive use of a highway. That question, notwithstanding the observations of Mr. Justice *Bhashyam Aiyangar* and Mr. Justice

1. (1808) 1 Taunton 279; 9 R. R. 770.
2. (1843) 11 M. & W. 827.
3. (1827) 7 B. & C. 257.
4. (1855) 4 E. & B. 860; 99 RR. 792.
5. (1893) 1 Q. B. 142.
6. (1900) 1 Q. B. 752.

Vibudapriya Thirtha-swamy v. Esuf Sahib. — Krishnaswami Aiyar J.

Subrahmanya Aiyar in *Vijia Raghava Chariar* v. *Emperor* [1], must now be deemed to have been set at rest by the decision of the Privy Council in *Sadagopa Chariar* v. *Krishnamoorthy Rao*[2] approving entirely of the judgment of this Court in *Sadagopa Chariar* v. *Rama Rao*[3]. And the two cases of *Kandasami Mudali* v. *Subroya Mudaly*[4] and *Mannada Mudali* v. *Nallaya Gounden*[5] are explicit upon the point. The presumption of complete dedication was affirmed in *Mannada Mudali* v. *Nallaya Gounden*[5] by *Benson* and *Sankaran Nair* JJ. when they said: "There is no evidence as to the origin of the user nor is there any evidence that the dedication was subject to any conditions." Dedication would be assumed if dedication was possible — *Farquhar* v. *Newbury Rural District Council.*[6] Where there has been a general user by the public a dedication without reservation would be presumed if that was possible. Mr. Sundara Aiyar's contention that a dedication without reservation cannot be presumed to have been made by the trustees of a Hindu temple has not been supported by references to the ceremonial or ritualistic practices of Hindu temples. It has undoubtedly been held that property vested in trustees cannot be presumed to have been dedicated as a highway where such dedication would be contrary to the trust. See *Rex* v. *The Inhabitants of Leake*[7] and *Neaverson* v. *Peterborough Rural Council*[8]; also PRATT on *Highways*, p. 23. But that is not sufficient to justify a conclusion of no dedication when the user as a highway for all purposes is established and objection is taken only to processions with music as opposed to the religious usages of the temple. It is enough, however, to say that as no evidence has been adduced in this case that the procession with music of the Mahomedan inhabitants would contravene the purposes of the trusts of the Hindu temple there is no impediment to the presumption of a dedication by the trustees of the highway unrestricted as to the mode in which the procession might be carried. But, as pointed out already, we are not obliged by any evidence in the case to suppose that

1. (1902) I.L.R. 26 M. 554.
2. (1907) I.L.R. 30 M. 185.
3. (1902) I.L.R. 26 M. 376.
4. (1909) I.L.R. 32 M. 478 p. 529.
5. (1909) I.L.R. 32 M. 527.
6. (1909) 1 Ch. 12.
7. (1833) 5 B. & Ad. 469; 39 R. R. 521.
8. (1901) 1 Ch. 22.

the highway was dedicated by the trustees of the temple. If it was not, no question of the legality of an unreserved dedication can possibly arise. It follows that the Subordinate Judge was wrong in granting the injunction as regards III-A. We must, therefore, dismiss the appeal with costs and allow the memorandum of objections in part by dismissing the suit as regards the injunction granted in respect of III-A. But as the respondents have partially failed with reference to the memorandum of objections, we make no order as to costs in regard to it.

Wallis J.:—I agree, and will only add that if it were proved that an unrestricted dedication by the trustees would be illegal—which has not been proved here—then a presumption in favour of a restricted dedication might arise as in *Grand Junction Canal Company* v. *Petley*[1], but before such a presumption could be raised I think an illegality of the kind suggested would have to be very clearly proved.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Nilayathakshi Ammal .. Appellant* (*Plaintiff*)

v.

The Taluq Board, Mayavaram, through its President .. Respondent (*Defendant*).

Charitable Endowments—Madras Acts—Local Boards Act V of 1884, S. 51 Madras Regulation VII of 1817, Ss., 23, 5, 13—Management of charity transferred to Taluq Board—Right of inspection of accounts in the absence of any allegation as to mismanagement — Practice — Pleadings—Powers of Taluq Board—No power to appoint trustee.

Where a will contained the following clause "I have appointed certain persons (named) as trustees. The said persons shall properly conduct the said charities and maintain correct accounts therefor in bound books accessible to all the persons"—and the Board of Revenue made over the management to the Taluk Board in consequence of alleged mismanagement of the trust in pursuance of S.51 of Madras Act V of 1884.

Held in a suit for inspection of the accounts of the charity against the Taluk Board by one of the trustees originally appointed by the testator :

That the suit for inspection was not maintainable in the absence of any averment as to mismanagement by the Taluq Board.

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1. (1888) 21 Q. B. D. 273.

*S. A. 1903 of 1908. 21st April 1910.

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Where the management is transferred to a statutory body the statute should be looked into and not the instrument of trust for finding out the duties of the Manager.

Obiter:—S. 51 of Madras Act V of 1884 has not the effect of continuing the "local agents" referred in Regulation VII of 1817. The substitution of the Taluk Board for the Board of Revenue is limited to powers and duties that are referred to in Ss. 2, 3 and 5 of Regulation VII of 1817, and does not include the power of appointing trustees; and consequently, the Taluk Board to which the Board of Revenue has transferred the management of a charity under S. 50 of the Madras Local Boards Act has not the power to appoint trustees.

Second appeal from the decree of the District Court of Tanjore in A. S. No.729 of 1907 presented against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 33 of 1906.

The Advocate-General (*P. S. Sivaswami Aiyar*) for appellant.

T. V. Seshagiri Aiyar and *T. Natesa Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff claims to inspect the account of a charity and has made the Taluk Board of Mayavaram defendants. By the will of the plaintiff's deceased husband, certain charities were created and trustees appointed. The plaintiff was one of them. In consequence of the alleged mismanagement the Board of Revenue intervened. It must be assumed for the purposes of this case that the management and superintendence of the endowment were made over to the Taluk Board under S. 51 of Madras Act V of 1884. The possession of the endowment property passed to the Taluk Board in due course. The plaintiff has ceased to be a trustee of the endowment and claims the right to inspect under a special clause in the will which runs as follows :—" I have appointed certain persons (named) as trustees. The said persons shall properly conduct the said charities according to their present scale and maintain correct accounts therefor in bound books accessible to all the persons." The power is given by the instrument to the trustees appointed for the nomination of their successors after their death. If the trustees make default in management and resign office the Government is given the power of appointing other trustees in their stead. There is no mention of the duty of maintaining correct accounts accessible to all in the case of the successors to be appointed by the trustees named or by the Government. It may, however, be assumed that it was the testator's intention that such a duty should be attached to the successors as well. But it is another question altogether

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whether the objection to maintain accounts accessible to all attaches to the Taluq Board which takes the place of the trustees appointed by the testator under special statutory authority in the absence of a special direction in the statute itself. We do not suggest that the Taluq Board as managers of a charity are not bound to maintain accounts like all managers of charitable institutions. But, as conceded by the learned Advocate-General, there would be no duty in such a case to allow inspection to any member of the public when there is no averment of mismanagement. The question merely is whether, in the absence of a charge of mismanagement, the direction contained in the will as to maintenance of accounts accessible to the public will *ipso facto* impose the obligation upon the statutory body which enters upon management under statutory powers. We think we must answer this in the negative. The duty to keep and give inspection of accounts is part of the function of management. When it is transferred by a special law to a statutory body we must look to that law and not to the instrument of trust for the duties of the manager. There being no provision in the Act requiring him to give the inspection sought for and no general right of inspection on a charge of mismanagement being now in question, we must negative the plaintiff's claim. This is sufficient to dispose of the second appeal. But the question has been argued at some length as to whether the action is maintainable against the Taluq Board, when it has transferred the management to another person, as in this case it is alleged to have done. This raises the further question whether the Taluk Board which has taken over the management under S. 51 of the Local Boards Act can appoint an independent trustee so as to divest itself of its duty of management. It has been held that under Regulation VII of 1817, the Board of Revenue has merely the powers of superintendence and not the right of actual management. The case *Vencatesa Nayudu* v. *Striman Shatagopa Shri Shatapaswami*[1], if it does not actually decide it, suggests this view in more than one place as the proper view to take with regard to the powers of the Board of Revenue. In *Panduranga* v. *Nagappa*,[2] *Muthusawmi Aiyar* and *Parker* JJ. point out that the powers of the Board of Revenue were primarily powers of supervision and control and that the committee constituted under Act XX of 1863 which was given the same powers as the Board of

1. (1872) 7 M. H. C. R. p. 77. 2. (1889) I. L. R. 12 M. 366.

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Revenue had under Regulation VII of 1817, was not entitled to sue for possession. In the *Chairman, Municipal Council, Rajahmundry* v. *Surla Venkataswarulu* alias *Venkatakrishna Brahmaswarulu*[1] it has been held that powers and duties of management did not attach to the Board of Revenue under Regulation VII of 1817 and they had no right to maintain a suit upon a bond executed in favour of a charitable foundation. But where, under S. 51, an institution is transferred by the Board of Revenue to the control of a Taluk Board, both powers of superintendence and of management are made over. To adopt the words of *Munro* and *Miller* JJ. to the facts of this case, the contention that the Taluk Board has merely stepped into the shoes of the Board of Revenue and has no greater powers does not seem to be correct. What was made over to the Taluk Board under S. 51 of the Local Boards Act was not only the superintendence of the charity but also the actual management. Is it competent to the Taluk Board to divest itself of the management given to it by virtue of S. 51 of the Local Boards Act? Mr. Seshagiri Aiyar contends that it is competent to the Taluk Board to do so and he relies on the clause in S. 51 of Act. V of 1884 which runs as follows :— "Thereupon all powers and duties which attach to the Board of Revenue in respect thereof shall attach to such Local Board as if such Board had been specifically named in the said Regulation." It is said that the power to appoint trustees is among the powers of the Board of Revenue under the Regulation and that, therefore, the Taluk Board has a like power. It is again contended that the provision that all powers of the Board of Revenue shall attach as if the Local Board had been named in the Regulation effects the substitution of the Local Board for the Board of Revenue wherever the latter term is employed in the Regulation. The question does not appear to us to be free from difficulty, but we are inclined to hold that the contention is not right. In the first place, unlike the Board of Revenue which has no management, the Taluk Board is given powers of management, which must be deemed to be inconsistent, in the absence of specific authority, with a right to delegate the management. In the second place, the power of appointing trustees vesting in the Board of Revenue under S. 13 of the Regulation and the

1. (1907) I. L. R. 31 M. 111.

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pre-requisite of such appointment being the receipt of a report from local agents, designated or appointed under the Regulation, it is difficult to argue that the Taluk Board has the same power of appointment when no local agents can be said to be contemplated as working under the Taluk Board and making reports to it. Reading Ss. 7 and 8 of the Regulation together it seems fairly clear that the local agents are public officers. We cannot suppose that S. 51 which continues to the Taluk Board the powers and duties of the Board of Revenue has the effect of continuing to maintain local agents who are public officers under the authority of the Taluk Board. The powers and duties which are continued are probably those that are referred to in Ss. 2, 3 and 5 of the Regulation and not necessarily powers of superintendence over local agents. S. 51 does not continue any duties or local agents towards Taluk Boards. The substitution of the Taluk Board for the Board of Revenue is limited to the powers and duties which attach to the Board of Revenue. We are inclined to hold that the Taluk Board does not possess the power of appointing trustees which the Board of Revenue had in virtue of the provision contained in S. 13 of the Regulation. It was suggested that S. 3 of the Regulation might be so construed as including the power to appoint trustees. We doubt whether it is admissible to include such an important power as that of appointing trustees under the general words of "taking such measures as may be necessary to ensure that all endowments are duly appropriated to the purposes for which they were destined." If S. 3 included such power of appointment it might, no doubt, be contended that the same power passed to the Taluk Board. But in the face of the specific provision contained in S. 13 of the Regulation we are disinclined to hold that the same power is to be swept into the somewhat general language of S. 3 of the Regulation. In this view, it follows that the Taluk Board has not the power to appoint independent trustees for the management of institutions taken over by it under S. 51 of the Local Boards Act. Having regard, however, to the opinion already expressed as to the plaintiff's right to claim inspection, we must dismiss the second appeal, but, in the circumstances, without costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD HIGH COURT.]

Present:—Lord Atkinson, Lord Shaw, Sir Arthur Wilson and Mr. Ameer Ali.

Bohra Thakur Das & others .. Appellants*

v.

The Collector of Aligarh & others .. Respondents.

Thakur Das *v.* Collector of Aligarh.

Mortgage bond—Construction—Usufructuary mortgage of two properties—Mortgagee purchasing one of them in execution of a decree on a prior mortgage—Liability of the other property to pay the whole mortgage debt—Mortgagee's undertaking to pay the Government revenue—Suit to redeem the other property by purchasers of equity of redemption—Mortgagee's right to tack on the amount of Government revenue paid—Laches—Equity.

Where two properties *A* and *B* were mortgaged to secure a debt, while one of them, *B*, had previously been mortgaged to secure a different debt due to the same person, and the property *B* was sold in execution of a decree obtained on the prior debt and bought by the mortgagee himself:

Held that the property *A* was liable to bear the entire burden of the subsequent mortgage debt.

Under the terms of the mortgage the mortgagee was to have possession of the mortgaged properties, realise the rents and profits and pay therewith the Government revenue due on each property and retain a sum of money for interest paying the balance as *malikana* to the mortgagor. It was further stipulated that the mortgagee should pay the increase in Government revenue and deduct it from the *malikana* due. The mortgagee paid the excess revenue due on *A* and *B* and claimed to tack on the excess revenue he paid in respect of property *B* before the execution sale to him to the amount payable on redemption of *A*. The mortgagee's name was placed on the Collector's register as mortgagee in possession. The redemption was sought for by a purchaser from the original mortgagor.

Held:—That it was the plain duty of the mortgagee to pay the Government revenue for both *A* and *B*; and he cannot he allowed to throw on the mortgagor the burden of his own laches in not deducting the amount paid from the *malikana* due on property *B*, before his purchase.

Held also:—That any equity which might have been invoked by the mortgagee against the original mortgagor did not subsist as between the mortgagee and the purchaser of the equity of redemption.

Two appeals (consolidated by an Order of His Majesty in Council) against two judgments and decrees of the High Court

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* 1910 June 8 & 9 and July 25.

of Judicature for the North-Western Provinces, dated the 10th April, 1906, in a suit for redemption of a mortgage in which the Courts below differed as to the amount of redemption money payable by the plaintiffs (appellants).

The main question for determination on the appeals related to the amount of redemption money payable by the appellants.

On the 5th July, 1870, one Mr. William Lineans Gardner executed a mortgage deed in favour of one Bakhshi Nand Kishore (now represented by the Collector of Aligarh) by which he hypothecated with possession 11 Biswa Zamindari in *Mauza Kachaura*, and 6 Biswa Zemindari in Mouza Agrana Jarara for Rs. 5,000 with interest at 12 per cent. per annum. The mortgagee duly obtained possession of the property mortgaged. The important terms of the deed of mortgage were the following:—

"The said mortgagee should like myself remain in possession of the mortgaged property aforesaid from 1870 up to the end of August, 1881, and pay the Government revenue of his own authority. As regards the interest, which I have agreed to pay to the creditor, at the rate of Re. 1 per cent. per mensem, I have made this arrangement that the mortgagee should himself take Rs. 600 a year on account of interest on Rs. 5,000 from the profits of the mortgaged property, and I should continue to take Rs. 2,400 a year, and shall give receipts for the same. If there remains any other amount of profit, the mortgagee shall be entitled to it by right of making collections. I shall have no claim to it. The mortgagee, like myself, shall have power to make collections and assessments in respect of the property in both the villages mortgaged, and to enhance the rent of tenants. I shall not in any way interfere with it, nor shall I have anything to do with increase or decrease. The mortgagee shall be entitled to profits and liable to loss in future. If, at the recent settlement, the Government revenue, which is paid at present, is enhanced or decreased to some extent, I shall be entitled to and liable for it, and the mortgagee shall have nothing to do with it. After the expiry of the term of the mortgage, whenever I shall pay the principal mortgage money, I shall get the

property redeemed and take it into my possession. I shall not have power to get the mortgaged property redeemed during the term of the mortgage. If perchance any money remains unpaid by the cultivators and is not realised by the mortgagee at the time of the redemption of mortgage, or the mortgagee spends some money out of his own pocket in the construction and repair of wells during the period of his possession, I shall pay that amount also, together with interest at Re. 1 per cent., at the time of redemption of mortgage without any objection or excuse."

Prior to the said deed the mortgagor had executed a simple mortgage of the entire 20 Biswa Zamindari in the said *Mauza Kachaura* on the 21st December, 1868, in favour of Bakhshi Nand Kishore, aforesaid, and one Dwarka Das. The mortgagees obtained a decree on the prior mortgage, and the said 20 Biswa in *Mauza Kachaura* was sold in execution thereof, and was purchased by the mortgagees (decree-holders) on the 20th June, 1878. The proceeds of the auction sale proved insufficient to satisfy the full decretal amount. The said Bakhshi Nand Kishore thus became absolute owner and possessor of 11 Biswa Zamindari in *Mauza Kachaura* jointly with the legal representative of the said Dwarka Das. But the auction purchasers failed to recover possession of the remaining 9 Biswa in *Mauza Kachaura* as it was established in subsequent litigation that the mortgagor had no proprietary interest in that property.

On the 20th December, 1873, the equity of redemption in 6 Biswa of Agrana was purchased by one Akhe Ram. Akhe Ram, who, by reason of his purchase, had become entitled in room of Mr. Lineans Gardner to the proportion of Rs. 2,400 chargeable on Agrana sued Nand Kishore for recovery thereof and ultimately got a decree from the High Court. He similarly recovered by suits the said proportion due for the subsequent years till 1281 Fasli.

In 1874, the Government revenue payable for Mauza Kachaura was enhanced by Rs. 895-15-9, which amount the mortgagee Bakhshi Nand Kishore paid for six years from 1873 to 1878. The enhanced revenue for Agrana was paid by the mortgagee, who deducted each year the amount so paid from the

proportionate *malikana* payable to the mortgagor or his representative in title in respect of that village.

Out of the 6 Biswa of Agrana, Akhe Ram's right in 5¼ Biswa passed to the appellants, who had been paid a proportion of the Rs. 2,400 till 1307 Fasli by the Court of Wards, which held possession of Nand Kishore's estate, but less than what the appellants alleged was due.

On the 4th July, 1901, the appellants instituted the present suit in the Court of the Additional Subordinate Judge of Aligarh for redemption of 5¼ Biswa of Mauza Agrana Jarara alleging, *inter alia*, that the property they were seeking to redeem was liable to a proportionate part of the principal debt of Rs. 5,000; that the balance of that debt was payable from the other security, *viz.*, Mauza Kachaura; and that the integrity of the mortgage was broken by reason of the respondent's purchase of the 20th June, 1878.

The respondent pleaded (*inter alia*) that the village Kachaura did not belong to Mr. Gardner, and that, therefore, the mortgage was limited to, and the whole amount due on it was realisable from, the said village Agrana; that the sale of the 20th June, 1878, did not destroy the joint character of the mortgage; that the 6 Biswa of that village could be redeemed only on payment of all the sums due and owing under the conditions of the mortgage deed, dated the 5th January, 1870; that the mortgage contained a clause to the effect that if, at a fresh settlement, the Government revenue should be increased, or decreased, the mortgagor would be responsible for it; that after the execution of the said mortgage the revenue of the 11 Biswa in the village Kachaura had been enhanced by Rs. 895-15-9 annually, and that of the 6 Biswa in the village Agrana by Rs. 532-3-0, and that the mortgagee was entitled to be paid by the mortgagor or his successors these enhanced amounts of revenue with interest at 12 per cent.

The appellants expressed their willingness to redeem the entire 6 Biswa in *Mauza Agrana Jarara*, but joined issue with the respondent on the pleas relating to the amount of money payable.

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The Additional Subordinate Judge fixed ten issues, but those material for the purpose of this report were the following:—

(1) Was the whole of the mortgage debt chargeable on Agrana only? Was the unity of the mortgage split up by the sale on the 20th June, 1878?

(2) Was any, and what sum payable to the defendants on account of enhanced revenue?

(9) What is the entire amount to be paid for the purpose of obtaining redemption?

On the 23rd of December, 1902, the Subordinate Judge made his decree by which he ordered that upon the appellants paying to the respondent the sum of Rs. 7,585-12-1 on the 23rd of June, 1903, the respondent should re-convey the property to the appellants free from all encumbrances created by them. With reference to the first issue he found that the whole debt had to be accounted for as if the village Agrana alone had originally been mortgaged, and that, on it the whole mortgage debt was chargeable. With regard to the second issue he decided that the respondents were entitled to the enhanced revenue of the village Agrana only, and not to the enhanced revenue of the village Kachaura.

Both parties appealed to the Court of the District Judge of Aligarh On the 2nd of January, 1908, the District Judge, with regard to the appeal of the respondent, held that the appellants were not liable to pay the increased amount of Government revenue assessed and paid in respect of the village Kachaura. And with regard to the appeal of the appellants he slightly modified the decree of the First Court in regard to certain items of the account, but, on the question whether the appellants could redeem the 6 Biswa of the village Agrana by paying only a proportional part of the debt he agreed with the Subordinate Judge in holding that, the Kachaura property being no security at all for the mortgage debt, the Agrana property must be held liable for the whole, and could not be redeemed without the payment of the whole debt. The result of the two appeals to the

District Judge was that the amount decreed by the First Court as payable to the respondent was reduced from Rs. 7,585-12-1 to Rs. 6,870-11-8.

Both parties appealed to the High Court. The appellants' appeal was No. 265 of 1904, and the respondents' No. 298, of 1904. The High Court delivered its judgment on the 10th April, 1906. It held that the appellants were liable to pay the entire mortgage debt; and further held that they were also liable to pay the enhanced Government revenue with interest at 12 per cent. per annum. In the result the High Court dismissed the appellants' appeal and allowed the respondents' appeal in part, and passed a decree accordingly. For a full report of the judgment see *Bohra Thakur Das* v. *The Collector of Aligarh* [1].

The appellants then brought the present appeals to His Majesty in Council.

De Gruyther, K.C., and *B. Dube*, for the appellants:— The mortgagee is not entitled to tack on to the principal debt the enhanced amount of Government revenue for Mauza Kachaura, and realise the same from the property other than Mauza Kachaura. The Transfer of Property Act (IV of 1882) does not apply to this case, but it does apply, as held by the High Court on the authority of *Girdhari Lal* v. *Bholanath* [2]. S. 72 must be read with S. 76 of that Act, and as under the mortgage the mortgagee undertakes the duty of paying the Government revenue, he is not now entitled to succeed in his claim as against the appellants. *Kamaya Naik* v. *Devapa Rudra Naik* [3] does not apply as the mortgagee in this case is as much bound to pay the Government revenue as the mortgagor. In any case the mortgagee is not entitled to any interest on the enhanced amount of the Government revenue. The suit is not brought by the mortgagee, and whatever equity there may be between the mortgagee and the mortgagor under the circumstances of this case, there could be no question of any such equity between the appellants and the mortgagee.

1. (1906) I.L.R. 28 All. 593. 2. (1888) I.L.R. 10 A 611.
3. (1896) I. L. R. 22 B. 440.

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G. E. A. Ross and *A. M. Dunne*, for respondent, adopted the argument on which the High Court based its judgment, and submitted that under the circumstances the burden of the whole mortgage fell entirely on the village Agrana, and that the mortgagee was entitled to get from the appellants the enchanced Government revenue assessed on Kachaura for the years 1873 to 1878, with interest thereon at 12 per cent.

De Gruyther, in reply, further referred to the Civil Procedure Code (Act XIV of 1882) S. 584; the Indian Contract Act (IX of 1872) S. 69; the Indian Trusts Act (II of 1882), S. 90; and *Kanu Ram Das* v. *Mozaffer Hosain Saha* [1].

The judgment of their Lordships was delivered by

Mr. Ameer Ali.—These two appeals, which have been consolidated by an Order of His Majesty in Council, arise out of a suit for redemption brought by the appellants in the Court of the Subordinate Judge of Aligarh in the United Provinces.

The property in suit, a 6-biswa share of Mouzah Agrana, was, with an 11-biswa share of Mouzah Kachaura, mortgaged in January 1870, by Mr. William L. Gardiner to one Bakhshi Nand Kishore, since deceased, for a sum of Rs. 5,000. Under the terms of the mortgage the mortgagee was to have possession of the mortgaged properties, realise the rents and profits and pay therewith the Government revenue which was separately assessed on the two shares. Out of the balance he was to retain Rs. 600 for the interest on the loan and pay the mortgagor a yearly sum of Rs. 3,400 as *malikana* or proprietor's allowance. In view of settlement proceedings in progress at the time, the deed further provided that "if at the recent settlement the Government revenue, which is paid at present, is enhanced or decreased to some extent, I [meaning the mortgagor] shall be entitled and liable for it, and the mortgagee shall have nothing to do with it."

As a matter of fact, the revenue respectively assessed on the two properties was enhanced, in the case of Kachaura by Rs. 895; in that of Agrana by Rs. 469.

On 20th December 1873, the equity of redemption in Agrana was acquired by the predecessor in title of the appellants who

1. (1887) I. L. R. 14 C. 809, at p. 825.

afterwards sued and obtained a decree for the apportionment of the *malikana* due in respect of the 6-biswa share of Agrana. Admittedly, the plaintiffs, appellants, have since received from Nand Kishore or his representatives the *malikana* for Agrana less the enhanced amount of the Government revenue assessed on it.

William Gardiner appears to have executed in 1868 a simple mortgage of Kachaura in favour of Nand Kishore and another, who in 1878 purchased the property in execution of a decree on their mortgage. They obtained possession, however, of only 11-biswa share under a decree of the Court.

In the present suit the appellants seek to redeem Agrana upon payment of a proportionate share of the Rs. 5,000, their contention being that as Nand Kishore purchased one of the properties on which the mortgage debt was secured, it was *pro tanto* satisfied, and Agrana was only liable for the share legitimately chargeable on it. As Kachaura was sold and purchased by Nand Kishore in execution and part satisfaction of a decree obtained on the prior mortgage of 1868, the Courts in India properly overruled the appellants' contention which has not been pressed before this Board.

Agrana, therefore, is now liable for the entirety of the mortgage debt. But the defendant, the Collector of Aligarh, representing the estate of Nand Kishore, among other pleas, urged that the mortgagee had from the date of the enhancement up to the time of his purchase paid the additional revenue assessed on Kachaura for which the mortgagor had made himself liable, and he was consequently entitled to tack on to the mortgage debt the amounts so paid, with interest from 1873 to 1878.

This claim was disallowed by the Court of first instance whose judgment was affirmed by the District Court. In second appeal by the defendant the High Court of Allahabad has taken a different view. It has held upon the construction of the clause in the mortgage bond relating to the liability of the mortgagor in case of enhancement of Government revenue that as the mortgagor did not fulfil his promise to pay the enhancement to save the property from being proceeded against for arrears of Government revenue, the defendants were entitled to the amount

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of Rs. 895-15-9 which they paid from 1873 to 1878 inclusive, with interest. The accounts taken on this basis have swelled the amount payable by the appellants in order to redeem Agrana to over Rs. 30,000.

Their Lordships regret they cannot concur with the learned Judges of High Court either in the construction of the clause under reference or in the view they have expressed regarding the liability for the payment of the enhanced amount of the assessment on Kachaura. The mortgage bond provided that the mortgagee should, like the mortgagor, remain in possession of the mortgaged properties during the term of the mortgage, and "pay the Government revenue oi his own authority." He had thus undertaken the duty of meeting the Government demand. The provision was as much for his own safety as that of the mortgagor. The condition as to mutation of names may be taken to have been duly carried out and his name placed on the Collector's Register as mortgagee in possession. The demand for payment of Government revenue would in the ordinary course be made upon him.

The *malikana* had been fixed on the basis of the existing revenue on the two properties ; but as settlement proceedings were pending which involved a possibility of a modification in the assessment, the parties provided that in case of reduction the mortgagor should have the benefit, whilst in case of enhancement the liability should be his. In other words, if the assessment was lowered, he would receive more by way of *malikana*, whilst if it was enhanced he would be entitled to less.

Their Lordships do not understand that the mortgagor, by the clause under reference, agreed to pay year by year separately the enhanced amount to meet the Government demand, or that the clause in any way altered the liability of the mortgagee in possession to pay the Government revenue assessed on the mortgaged properties. The conduct of the mortgagee in respect of Agrana may be taken as affording some indication of the meaning the parties attached to the clause. After the decree for the apportionment of the *malikana* in respect of Agrana, he invariably deducted the additional amount of the assessment from the sum payable to the appellants. Instead of taking the same

course with regard to Kachaura, he appears to have paid to the mortgagor the whole *malikana* less the share payable for Agrana.

In their Lordships' judgment the principle on which the learned Judges of the High Court have based their view of the rights of the parties is not applicable to the circumstances of the present case. It was the plain duty of the mortgagee to pay the Government revenue for both properties; in one case he took care to protect himself by deducting the enhanced revenue from the *malikana*; in the other he omitted to do so. Whatever the reason, he cannot be allowed now to throw the burden of his own laches on Agrana.

In the present suit it is not the mortgagor who is seeking to redeem the property; and it seems to their Lordships that any equity that might have been invoked against him does not arise as against the plaintiff.

On the whole their Lordships are of opinion that the decree of the High Court, dated the 10th April 1906, in Second Appeal 265 of 1904, should be affirmed, and the decree of the High Court of even date in Second Appeal 298 of 1904, should be discharged, and in lieu thereof it should be ordered that the accounts between the parties should be taken on the lines laid down by the District Judge in partial modification of the Order of the Court of first instance. And their Lordships will humbly advise His Majesty accordingly.

Their Lordships think that, in the circumstances, the parties should bear their respective costs before this Board and in the High Court.

Solicitors for appellants.— *Barrow, Rogers and Nevill.*

Solicitor for respondents.—*The Solicitor, India Office.*

Kedar Nath v. Ratan Singh

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE JUDICIAL COMMISSIONER'S COURT, OUDH.]

Present :—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali

Maharaj Kedar Nath & others .. Appellants*

v.

Thakur Ratan Singh .. Respondent.

Hindu Law—Joint family property—Confiscation—Government grant of a part of the property to one member of the family—Whether the estate comprised in the grant was joint or separate—Separation of one member of the joint family—His subsequent claim to a share of the joint property—Partition.

Before the annexation of Oudh certain estates belonged to an undivided Hindu family consisting of three brothers, *G.*, *U.*, and *R.*, of whom *G.*, the eldest, was the manager. The estates were confiscated, but the Government made *G.* a grant of the estate in suit. *G.*, when examined with a view to the preparation of the khewat of the estate, stated that he and his brothers were "joint in equal shares." The khewat, which was signed by the three brothers and countersigned by the presiding officer, gave under the heads "Shares of Proprietors" and "Names of Zamindars," the names of the three brothers "all three in equal shares." *G.* never disputed the right and title of his brothers to a joint share in the property ;

Held, that it must be inferred that under a family arrangement, which could not now be questioned, the three brothers became jointly entitled as members of an undivided Hindu family to the estate in suit, although the Government grant was to *G.* alone.

The three brothers continued to live jointly until 1867, when U. quarreled with *G.*, left the family home, and brought a suit for partition. *R.* too, brought a similar suit, claiming one-third of the estate, but he remained with *G*, and withdrew his claim. *G.*, died in 1869. *U.*, then, made *G*'s widow a defendant and a decree was made by consent giving *U.* one-third of the estate. *R.* made an arrangement with *G*'s widow, who executed a will in his favour, that she was to remain in possession, and that his rights were to be in abeyance during her life. On the death of *G*'s widow in 1896, *U.* claimed one-half or in the alternative one-fourth share of the two-thirds of the estate that was in her possession during her life :

Held, on the evidence, that *U.* had altogether failed to prove that *G.* died entitled to either two-thirds or one-third of the estate as separate property ; and that *R.* remained joint with *G.* till the latter's death and then became entitled to two-thirds of the estate.

Appeal from a decree of the Court of the Judical Commissioner of Oudh (May 4, 1906) reversing that of the Court of the Subordinate Judge of Sitapur (March 24th, 1905).

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* 1910 April 19 & 20, and June 7.

The main question for determination in the appeal was whether the property in suit was the property of one Gayadin Singh alone, or of the family represented by him. Kedar Nath v. RatanSingh

The facts of the case are given in their Lordship's judgment. The appeal arose out of a suit brought by one Umrao Singh (since deceased, and represented in this by the second and third appellants, Sripal Singh and Musammat Sarabjit Kuar) and Khedar Nath, the first appellant and a purchaser of a part of Umrao Singh's rights, for possession of one-third, or in the alternative one-sixth, of an estate known as Sherpur in the Sitapur District. The plaintiff's case was that the estate in dispute belonged to Gayadin Singh, brother of Umrao Singh, and of the defendant-respondent Ratan Singh; that Gayadin died in 1869, and was succeeded by his widow, Lachan Kuar, who died in 1896; and that on her death the plaintiff Umrao Singh and the defendant Ratan Singh each became entitled to half of two-thirds of the estate that had been in her possession. The plaintiffs also pleaded that if Gayadin was held to have been the owner of one-third of the estate, then they claimed one half of that one-third, or one-sixth of the whole.

The defence was that the estate of Sherpur was previous to 1865 the joint property of the three brothers; that Umrao separated in 1865, leaving Gayadin and Ratan in joint posseesion of two-thirds of the estate and obtaining one-third of the estate by a consent decree against Lochan Kuar; and that on the death of Gayadin, Ratan became entitled to the entire two-thirds, but allowed Lochan Kuar to remain in possession for her life. The Subordinate Judge made a decree in favour of the plaintiffs for one-sixth of the estate, but on appeal by both parties the Court of the Judicial Commissioner of Oudh dismissed the appeal of the plaintiffs and allowed the appeal of the defendant, with the result that the suit of the plaintiffs was dismissed with costs. The plaintiffs, then, appealed to His Majesty in Council.

De Gruyther, K. C., with him *K. Brown*, for the appellants:—The effect of Lord Canning's Proclamation of March 15, 1858, is to divest all the landed property from the proprietors in Oudh, and to transfer it to, and vest it in, the British Government, with the result that all, who since that date claim title to

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such property, must claim through the Government, and where a re-grant is made to a former owner the new title will depend entirely on the terms of the re-grant: *Nawab Malka Jahan Sahiba* v. *Deputy Commissioner of Lucknow*[1]; and *Prince Mirza Jehan Kadr Bahadur* v. *Nawab Afsur Bahu Begum*[2]. Again, estates conferred by Government in the exercise of their sovereign power became the self-acquired property of the donee, whether such gifts are absolutely new grants, or only the restoration to one member of the family property previously held by another, but confiscated, unless some contrary intention appears from the grant—*Mayne on Hindu Law and Usage, 7th Ed., p.* 358 *S*, 286. The terms of the grant here do not show that it was made to Gayadin in trust for himself and his brothers. It is a grant to Gayadin alone and confers an absolute title on him. He is, therefore, the absolute owner of the property in suit. Reference was also made to a Compendium of Oudh Taluqdari Law, by J. G. W. Sykes, pp. 285, 286 and 379.

The result of the unconditional withdrawal of Ratan Singh from his suit is that he abandons all claims to the property in suit. If the property were joint, Ratan Singh would have been entitled to the whole on the death of Gayadin and Gayadin's widow would have got nothing. But she held the property during her life and Ratan Singh had nothing. This could only be explained on the hypothesis that the property was the self-acquired property of Gayadin. On the death of his widow Umrao and Ratan each became entitled to a half of two-thirds left by Gayadin.

Further, in the alternative, on the separation of Umrao there was a separation of all the three brothers, and Gayadin became entitled to one-third share, though there was no participation of the property by metes and bounds between Ratan and Gayadin unless it is proved like any other fact that there was an agreement between Ratan and Gayadin to remain united or to subsequently unite: *Appuvier* v. *Ram Subba Aiyar*[3]; *Balabux Ladhuram* v. *Rukhmabai*[4] and *Musammat Parbati* v. *Chaudhri Nannihal Singh*[5]. There is no evidence here to show that

1. (1879) L. R. 6 I. A. 63 at pp. 73, and 74.
2. (1878) I. L. R. 4 C. 633 (P.C.)
3. (1866) 11 M. I. A. 75 at pp. 89, 90 and 91.
4. (1903) I. L. R. 30 C. 729 (P.C.)
5. (1909) I. L. R. 31 A. 412, 421 and 423. (P.C.)

Gayadin and Ratan agreed to remain united or that they subsequently became re-united. Gayadin, therefore, at his death had one-third of the property separately, and Umrao is entitled to one-half of that one-third. Again, a division of right in the property is created the moment an intention to divide is asserted. Ratan asserted such an intention when he filed a suit for partition, and he and Gayadin had a division of right in law from the date of the filing of the suit—*Appavier* v. *Ram Subba Aiyar*[1]. In *Goy Narain Giri* v. *Girish Chunder Myti*[2] a decree for partition was confirmed giving mesne profits from the date of the suit, that is from the date on which a demand for partition was made. In another partition suit the judgment found that the estate was partible, and the plaintiff was entitled to a moiety. Whether or not a decree was framed, the judgment was treated in subsequent Proceedings as equivalent to a declaratory decree determining that there was to be a partition of the estate, and it was held that that amounted to a partition —*Chidambram Chettiar* v. *Gouri Nachiar*[3], which also shows that a division of right is created on the assertion of an intention to divide. Ratan and Gayadin must be taken to have divided their right in the property from the date on which Ratan instituted his suit for partition, and each must be taken to have enjoyed a third of the property separately from that date. Gayadin's share, on his death, passed to his widow, on whose death Umrao became entitled to one-half of that.

Sir Robert Finlay, K. C. (with him *G. E. A. Ross*) for the respondent :—A grant by the Government to one member of the family, of property which belonged to the family jointly, does not affect the rights of the family and is not intended for the sole benefit of the grantee :—*Hurpurshad* v. *Sheo Dyal*[4]. There is no expression of any intention on the part of the Government in the grant to show that it was made for the sole benefit of Gayadin. In the absence of such an expression of intention it must be

1. (1866) 11 M. I. A. 75 at pp. 89 to 91.
2. (1878) L. R. 5 I. A. 228, the decree confirmed at p. 230, S. C., I.L.R. 4, C. 434.
3. (1879) I. L. R. 2 M. 83.
4. (1876) L. R. 3 I. A. 259, S. C. 26 W. R. 55 (P.C.)

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presumed that the grant was for the benefit of the family. There is evidence to show that the grant was to Gayadin, who was to hold the estate for the benefit of the family, and it was on this basis that Umrao got his third share partitioned. If the property were the self-acquired separate property of Gayadin, Umrao could not have got his third share. Having got his third share on the basis of the property being joint, he now puts forward a claim, which is based on the basis that the property was the self-acquired separate property of Gayadin, and is entirely inconsistent with his previous case.

The Courts in India have concurrently found as a fact that Gayadin and Ratan remained joint until Gayadin's death. Such a finding is now binding.

It is contended that the mere fact that Ratan Singh filed a suit for partition, amounts to a partition of right in law. An actual agreement, or a decree, or an award for partition, or an abandonment of a share dissolves the joint tenure—MAYNE on *Hindu Law and Usage*, 7th Ed., pp. 671-673, S.495. There is no authority for saying that the mere fact of setting out the property in a plaint and filing it in a suit, though withdrawn, effects partition.

[*Mr. Ameer Ali* referred to *Debee Pershad* v. *Phool Koeree*[1] where it was held that a suit by one member of a family for a declaration of his right was not a sufficient indication on the part of the family of their intention to separate.]

[*Sir Arthur Wilson*:—Is there a case where one co-parcener declared that he was separate, and it was held that such a declaration constituted partition ?]

[*De Gruyther*: A mere declaration by one member that he was separate from others would seem to be sufficient to effect the separation—*Radha Churn Dass* v. *Kripa Sindhu Dass*[2].]

That case has no application here. In each of the cases relied on there was either a decree or an agreement for partition.

1. (1886) 12 W. R. 510.
2. (1879) I. L. R. 5 C. 474, at p. 477.

It is submitted that the estate in suit was joint and that the decree of the lower appellate Court is right. Kedar Nath v. RatanSingh

De Gruyther, in reply :—The determination of the question whether the estate in dispute is joint or separate turns upon the application of certain legal principles. It is a question of law, and not of fact only—*Musammat Parbati* v. *Chaudhri Nannilal Singh*[1] and *Raj Bahadoor Singh* v. *Achumbit Lal*[2]. A concurrent finding on such a question is not binding. Any arrangement by which one member of the family abandons his rights to a share amounts to a partition in respect to the property as abandoned, even though he takes no specific portion in its place—MAYNE on *Hindu Law and Usage*, 7th Ed., p. 673. Here Ratan Singh abandoned his right by some arrangement with Gayadin, and that amounts to a partition. Where there is an arrangement by the reversionary heirs with the widow that she is to have life estate, there is no question of limitation as against the reversioners—*Sham Koer* v. *DahKoer.*[3] The estate in *Kur Purshad* v. *Sheo Dyal*[4] was excluded from Lord Canning's Proclamation of 1858. Reference was made to *Thakoor Hardeo Bux* v. *Thakur Jawahir Singh*[5].

The Judgment of their Lorships was delivered by

Lord Macnaghten:—This is an appeal from the Court of the Judicial Commissioner of Oudh.

It seems that before the annexation of Oudh two estates, called Bohra and Sherpur, belonged to an undivided Hindu family, the members of which then were three brothers, Gayadin, Umrao and Ratan. They were born of different mothers. Gayadin was much the eldest, and a man of about middle age. He was the manager. The other two were minors. Umrao was quite young, and Ratan at the time was a mere child. After the confiscation the Government was minded to

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1. (1909) I. L. R. 31, A. 412 (P.C.)
2. (1879) L. R. 6 I. A. 110 at p. 112, S. C. 6 C. L. R. 12.
3. (1902) I. L. R. 29 C. 664.
4. (1876) L. R. 3 I. A. 259, S. C. 26 W. R. 55 (P.C.)
5. (1877) I. L. R. 3 C. 522 (P.C.)

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restore the family property, and a grant of it was either issued or in immediate contemplation, when it was discovered that Gayadin was in possession of a quantity of concealed arms. The property was again confiscated, and Gayadin was put in prison. Then Gayadin or his servants made disclosure of similar offences committed by other landholders, and so induced the Government to look favourably on his case. Ultimately the Government made him a grant of Sherpur, which in value was about equal to one-third of the whole family property.

The question is :—Was Sherpur the self-acquired property of Gayadin, or was it the joint property of the three brothers ?

Now Gayadin himself, when examined with a view to the preparation of the Khewat of Ilaka Sherpur, stated that he and his two brothers were "joint in equal shares" and the Khewat, which is signed by Gayadin, Umrao and Ratan (Umrao's signature being affixed by Ratan), and countersigned by the presiding officer on the 24th September, 1860, gives under the head "Shares of Proprietors," and "Names of Zemindars," "Gayadin, Umrao Singh, and Ratan Singh, sons of Bakht Singh, all three in equal shares."

Gayadin never disputed the right and title of his two brothers to a joint share in the property.

It would seem, therefore, that it must be inferred that under a family arrangement, which cannot now be questioned, the three brothers became jointly entitled as members of an undivided Hindu family to the Sherpur estate although the Government grant was to Gayadin alone.

The three brothers continued to live joint until a year or a year and a half before Gayadin's death, which occurred in January 1869. In 1867 Umrao quarrelled with Gayadin, left the family home, and brought a suit for partition. Ratan, too, brought a suit for partition, claiming one-third; but he remained with Gayadin and withdrew his claim. Umrao, on the other hand, continued his suit, making Gayadin's widow a defendant, and there was a decree by consent, giving Umrao one-third of

the estate. Ratan made an arrangement with the widow, who had executed a will in his favour, that she was to remain in possession, and that his rights were to be in abeyance during her life. Effect was given to this arrangement when Ratan afterwards claimed one-third in a suit which he brought against the widow, alleging that she was wasting the estate.

Gayadin's widow died in 1896. In 1900, Umrao, with the assistance of his co-plaintiff, a mortgagee, brought forward his claim, asserting that Sherpur was Gayadin's self-acquired property. The Subordinate Judge of Sitapur decided in his favour; but in the Court of the Judicial Commissioner this decision was reversed, and the suit was dismissed. The judgment was delivered by Mr. Chamier, the Judicial Commissioner. "It appears to me," said the learned Judge, "to be clear that Ratan Singh remained joint with Gayadin till the latter's death, and then became entitled to two-thirds of the property. In my opinion the plaintiffs have altogether failed to prove that Gayadin died entitled to either two-thirds or one-third of the Sherpur estate as separate property."

Their Lordships agree in that opinion, and they will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants:—*T. L. Wilson* & *Co.*

Solicitors for respondent:—*Barrow*, *Rogers and Nevill.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CALCUTTA HIGH COURT.]

Present:—Lord Macnaghten, Lord Collins, Sir Arthur Wilson and Mr. Ameer Ali.

Lala Bhagwat Sahai, since deceased, and others .. .. Appellants.*

v.

Bepin Behari Mitter, since deceased, and others .. .. Respondents.

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* 1910 April, 14th and July 15th.

Bhagwat Sahai v. Behari Mitter.

Partition—Right of—Interests permanent but not co-ordinate in degree Mokuraridar's interest and Zemindari interest.

Where two parties are in joint possession of land under permanent titles there is a right to partition, even though the titles are not identical *e.g.* (as in this case a Mokuraridar's interest, and a Zemindar's interest) and the fact that one of them, the Mokuraridar's interest, is liable to forfeiture certain contingencies does not affect the rule.

Appeal from a judgment and decree of the High Court at Calcutta (May 5, 1905) reversing those of the Subordinate Judge of Gaya (February 4, 1904).

The sole question for determination on the appeal was whether the appellants, who were proprietors of a Mokurari interest, liable to forfeiture, in certain properties, were entitled to partition them, as against the opposing respondents, who were owners of a fractional share in the Zemindari interest in the same properties.

The properties to be partitioned consisted of three villages, *viz.*, Kalapahar, Nimajodha and Murouli Khurd. The proprietary interest in the three villages was vested to the extent of an 8 annas share in Rai Pasupati Nath Bose, respondent No. 4 (defendant No. 1), while the remaining 8 annas share belonged to Bepin Behari Mitter, Pramatha Nath Mitter, and Chandra Nath Mitter, respondents Nos. 1, 2 and 3 (defendants Nos. 2, 3 and 4), who contested the present appeal.

On the 16th September, 1865, Rai Sham Lal Mitter and Rai Mohan Lal Mitter granted a Mokurari lease of a 7 annas 6 pies share in the said villages to Kishori Lal, Lila Singh, Bunwali Lal and Jugmohan Singh. The lease was made jointly to the four lessees subject to a liability to pay a joint rent of Rs. 626 per annum, but at the bottom of the lease the respective shares of the lessees *inter se* were set out as follows:—

Kishori Lal	..	..	..	1 anna 8 pies.
Lila Singh	..	..	..	1 „ 8 „
Banwari Lal	..	..	..	1 „ 8 „
Jugmohan Singh		..	..	2 annas 6 „

The Kabuliyat executed by the lessees, as declarants, provided for forfeiture in certain circumstances in the following terms:—

" In case of our making default in payment of an instalment we shall have to pay (interest) for the defaulted instalment at the rate of one rupee per cent. per mensem, and in the event of our

making default in payment of three consecutive instalments, or of our transferring the Mokurari tenure by dar-Mokurari, sale, conditional sale, gift, mortgage or in any other way, or in the event of our allowing a single bigha or biswa of the land included in the said Mouzahs to go out into the hands of other persons, or in the event of our committing extortionate acts and exercising *zulum* in any way upon the tenants of the village, the Zamindars and their heirs shall have power to take direct possession of the said Mouzahs and to settle the same with others, and we, the declarants, and our heirs have and shall have no claim on the Mokurari or to the return of the Nazrana money aforesaid. Save and except receiving the rent mentioned in this kabuliyat, the proprietors have and shall have no right to prefer any title, make any demand or raise any dispute about the Mokurari property."

On the 21st January, 1869, Banwari Lal sold his 1 anna 8 pies share in the lease to Lila Singh, and on the 19th March, 1878, the lessees agreed among themselves that instead of the above share in the said three villages their interests should be as follows:—

The sons of Kishori Lal should have 7 annas 6 pies share in Nimajodha;

Jugmohan Singh should have 3 annas 9 pies share in Kalapahar, and

Lila Singh should have 3 annas 9 pies in Kalapahar and 7 annas 6 pies in Murouli Khurd.

Bhagwat Sahai and Beni Pershad, appellants Nos. 1 and 3, purchased by two deeds, dated the 13th April, 1891 and 12th September, 1893, from the sons of Kishori Lal, *viz.*, Sita Ram, Sheo Saran Lal, Bhagwat Lal and Sri Kishen Lal, a 10 pies share in the three villages, and on the 27th May, 1894, they purchased a 2 annas 6 pies share in the same from Jugmohun Singh. Thus they became entitled to 3 annas 4 pies share in all in the said three villages.

The contesting respondents then instituted a suit for cancellation of the Mokurari lease on account of a breach of the above-mentioned covenant. The purchasers compromised the suit by paying the lessors a sum of money to waive the forfeiture

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and to recognise the transfers in question. On the 6th April, 1896, an agreement was executed by which the contesting respondents accepted the purchasers as substituted lessees.

On the 13th August, 1903, the appellants instituted the present suit in the Court of the Subordinate Judge of Gaya to obtain separate possession by partition of their interest in the said villages, either on the basis of the agreement of the 10th March, 1878, or on the basis of the shares specified in the original lease. They impleaded as defendants the contesting respondents, Rai Pasupati Nath Bose, Lila Singh, and two persons, *viz.*, Mathura Pershad and Jagdam Sahai, purchasers from the sons of Kishori Lal of 3 annas 9 pies share in Nimajodha. Subsequently all the vendors were also added as defendants. They did not, however, appear and enter a defence.

The co-sharers in the lease supported the claim for partition, and it was not opposed by Rai Pasupati Nath Bose.

The contesting respondents filed a written statement in defence, and pleaded, *inter alia*, that the appellants were not entitled to claim a partition.

Of the 7 issues fixed by the Subordinate Judge it is necessary to mention here only the following:—

5. Can the plaintiffs claim a partition in this suit as against defendants Nos. 2 to 4?

The Subordinate Judge decreed the suit holding that as the contesting respondents had accepted separate rent from the appellants, they had, by so doing, admitted a division of the tenancy, and could not resist the claim for partition.

The High Court, on appeal by the contesting respondents, decided that the interest of the appellants as against those respondents in the lease was not of a nature to entitle the former to claim a partition as against the latter. The decree of the Lower Court was accordingly reversed and the suit was dismissed with costs. The material part of the judgment of the High Court was as follows:—

"There are no precedents for such a suit as this. No case has been cited to us which is exactly in point. Our attention has

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been called to the cases of *Parbati Charan Deb* v. *Ainuddin*,[1] *Mukunda Lal Pal* v. *Lehuraux*[2] and the Full Bench case of *Hemadri Nath Khan* v. *Ramani Kanta Roy*[3]. The first of these has no application. In the second, the principle that to entitle a person to partition, there must not only be joint possession, but the possession must be founded on the same title, was laid down. On this principle, the plaintiffs have no right to partition. But the *ratio decidendi* of *Mukunda Lal Pal* v. *Lehuraux*[2] was disapproved of in the 3rd case cited to us, *viz.*, the Full Bench case of *Hemadri Nath Khan* v. *Ramani Kanta Roy*.[3] This case was one brought by a Zamindar, a 10 annas co-sharer, for partition against a putnidar of a 6 annas share. It was held that the plaintiff was entitled to partition in the circumstances of the case. But the learned Judges of the Full Bench laid down no general rule. On the contrary Mr. Justice *Bannerji*, who delivered the judgment of the Court said :—'I think the Court must in each case determine whether, having regard to the nature of the interest owned by the parties, and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition; and if it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree ought not to be a bar to partition." Hence it is clear that the fact that the plaintiffs are Mokuraridars and the defendants or some of them are proprietors, will not bar the partition sought for in this case. But the learned Judge in the body of his judgment observed, "as to the second ground the only reason that might be urged in its support is that if partition can be enforced as between co-owners whose interests are not co ordinate in degree, parties having permanent interest may be put to frequent and needless expense and trouble by having to watch partition proceedings instituted at the instance of co-owners with temporary interest, such proceedings not leading to any division of the property which can have a lasting effect. But in the present case no such reason can hold good, in the first place, because the party who is asking for partition is the holder of the higher of the two kinds of interest respectively owned by the parties to the suit,

1. (1881) I.L.R. 7 C. 577. 2. (1892) I.L.R. 20 C. 379.

3. (1897) I.L.R. 24 C. 575.

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his interest being that of a Zamindar, so that there can be no apprehension of the division effected not having an enduring effect; and, in the second place, because the interest owned by the party against whom partition is sought, though subordinate to that of the plaintiff, is certainly not of a temporary and qualified character such as would make it undesirable to have a partition against him and to subject him to the trouble and expense of a partition proceeding." Again, Mr. Justice *Beverley* in his judgment in the case has said: "The right to a partition can only, in my opinion, exist as between co-parceners holding similar interests in the property. How 'similar interests' should be defined it may not be easy to say. They should probably be permanent, transferable interests. A temporary leaseholder of an undivided portion of an estate ought not, in my opinion, to be allowed to put his lessor to the trouble and expense of a partition."

"The rule to be deduced from these passages would seem to be that partition should not be allowed when the interest of one or more of the persons owning interests in the property to be partitioned is of a temporary and qualified character—is not a permanent and transferable interest—and when there may be an apprehension that the division effected may not have an enduring effect.

"Now, to apply these rules to this case. The interests of the holders of the mokurari in $7\frac{1}{2}$ annas share of the properties would seem to us not to be of a permanent and transferable nature, but to be rather of a temporary and qualified character for two reasons:—(1) that the mokurari, by the terms of the lease of the 16th September, 1865, is to become null and void on default of payment of 3 instalments of the mokurari rent. Hence the mokurari may cease at any time.

"Then, there is a further clause prohibiting alienation subject to the same penalty. Alienation of part of the mokurari interest has no doubt taken place and been condoned, but on the defendants, Nos. 2 to 4, instituting a suit to cancel the mokurari on the ground of this alienation, the present plaintiffs, Nos. 1 to 3, at once compromised the matter with them by paying a bonus of Rs. 500 and costs, and obtaining a distribution of

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the rent. This was effected by the *ekrarnama* of 6th April, 1896. But the defendants, Nos. 2 to 4, do not appear to be bound to overlook and condone any future alienation of any other portion of the mokurari interest.

"In these circumstances, it seems to us that the interests of the plaintiffs in this case are not of such a permanent and transferable nature as to ensure that any division that may now be effected will be of enduring effect. For this reason we do not consider them entitled to partition against the wishes of the defendants, Nos. 2 to 4."

Against the decree of the High Court the appellants appealed to His Majesty in Council.

Kenworthy Brown, for the appellants :—The parties are in joint possession under permanent titles, and the appellants are entitled to partition, though their interest is not identical with that of the contesting respondents—*Hemadri Nath Khan* v. *Ramani Kanta Roy*[1], the judgment in which case is based upon the English law on the subject. In case of joint ownership each party has a right to demand and enforce partition, in other words, a right to be placed in a position to enjoy his own right separately and without interruption or interference by others—*Rani Somasundari Debi* v. *Jardine Skinner & Co*[2]. A tenant in common is entitled as of right to a partition of the property held in common—*Mayfair Property Company* v. *Johnson*[3], where a wall was partitioned, and all the earlier English cases on the point are considered. The appellants would be entitled to a decree for partition under the English law, and such a decree would be in accordance with the rules of justice, equity and good conscience, which the Courts in this case are directed to follow in cases not provided for by any definite rule of law—The Bengal, United Provinces and Assam Civil Courts Act (XII of 1887), S. 37. In England a tenant for life of an undivided share of an estate, with remainders to his unborn sons in tail, was held entitled to a partition decree binding on the sons when *in esse*—*Gaskell* v. *Gaskell*[4]. One of the two co-heiresses, in joint possession of property by Hindu law, could

1. (1897) I.L.R. 24 C. 575.
2. (1869) 3 Beng. L.R. Appendix 120.
3. (1894) L.R. 8 Ch. 508, at p. 513.
4. (1836) 6 Simon, 643.

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enforce a partition against the other—*Srimati Padmani Dasi* v. *Srimati Jagadamba Dasi*.[1] Hindu widows in joint possession of the property of their deceased husband, are entitled to partition that property—*Mussammat Sundar* v. *Mussammat Parbati*[2]. The appellants, who are jointly in possession with the respondents, are entitled to partition. A patnidar, whose right extends over only a fractional share of one of many mouzas in the Zemindari, is entitled to partition—*Uma Sundari Debi* v. *Benode Lal Pakrashi*[3]. A party having a life estate determinable on his marriage, in one-fifth of an estate, is entitled to a decree for partition—*Hobson* v. *Sherwood*[4]. Similarly, a grantee of a lease of mines under an estate from one of the two tenants in common is entitled to a decree for partition—*Heaton* v. *Dearden*[5]. These cases show that identity of titles is not necessary to obtain a decree for partition.

De Gruyther, K. C. (with him *S. A. Kyffin*) for the contesting respondents :—The mokurari here is heritable, but it is not transferable. It is limited to 7 annas 6 pies share. It provides for forfeiture in case of a transfer by the lessees. The agreement of the 16th April, 1896, under which the appellants were recognised as substituted tenants, contains the covenant which is in the original mokurari, for forfeiture, in the event of a transfer by the lessees. There is no authority to show that the holder of a mokurari, liable to forfeiture, is entitled to partition as against the zemindar. The arrangement of the 10th March, 1878, was not binding on the respondents, who have never recognised it—Bengal Tenancy Act (VIII of 1885), S. 88. After referring to the Bengal Regulation 19 of 1814, S. 5, and the Estates Partition Act (V of 1897, B. C.), Ss. 3, 4, 5, 6, 8, 23 and 99, it was submitted that partition of proprietary interest, that is to say, partition among owners, could be effected, but there was no provision in that Act entitling a patnidar or mokuraridar to partition as against a proprietor.

[*Sir A. Wilson*—The argument comes to this, that a man has no right to partition unless he is an owner.]

That is so, my Lord.

1. (1871) 6 Beng. L.R. 134.
2. (1889) I.L.R. 12 A. 51 (P.C.)
3. (1907) I. L. R. 34 C. 1026.
4. (1841) 4. Beavan 114.
5. (1852) 16. Beavan 147.

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The English cases relied upon have no application. The cases of *Hobson* v. *Sherwood*[1] and *Heaton* v. *Dearden*[2] were decided under two English statutes, *viz.*, 31 *Henry VIII*, c. 1 and 32 *Henry VIII*, c. 32, which do not apply to India. The origin of partition between tenants in common and joint tenants is to be found in these two statutes. It is wholly misleading to draw any analogy from the English law of real property while dealing with the land law of India—*Kally Dass Ahiri* v. *Manmohini Dassee*[3] and *Abhiram Goswamy* v. *Shyamacharan Nandi*[4].

Joint possession alone is not a sufficient ground for compelling partition, and co-parceners, who have a right to partition, must be in joint possession, which must be founded on the same title—*Mukunda Lal Pal Choudhry* v. *Lehuraux*[5]. After referring to *Ridai Nath Sandyal* v. *Iswar Chandra Saha*[6], *Parbati Churn Deb* v. *Ain-ud-Deen*[7], *Shama Sundaree Debia* v. *Jardine Skinner* & *Co.*[8], *Ruttun Monee Dutt* v. *Brojo Mohan Dutt*[9] and *Baboo Lalljcet Sing* v. *Baboo Raj Coomar Singh*[10], they submitted that the appellants, who were interested in a mokurari, liable to forfeiture, were not entitled to partition as against those respondents who had a zemindari interest. *Hemadri Nath Khan* v. *Ramani Kanta Roy*[11] is applicable only to the facts of that particular case, and it is not an authority to entitle a mokuraridar to demand partition as against his own landlord. They also distinguished *Uma Sundari Debi* v. *Benode Lal Pakrashi*[12] and *Mussammat Sundar* v. *Mussammat Parbati*[13], and submitted that these cases had no bearing on the facts of the present case.

Brown, in reply, distinguished the cases cited against him, and further referred to STORY'S *Equity Jurisprudence* (1884), S. 648; STEPHEN'S *Commentaries on the Laws of England* (1908), Vol, I, Bk. II, Pt. I, Ch. IX; Bengal Tenancy Act (VIII of 1885), Ss. 4 & 5; *Sriram Chakravarthi* v. *Hari Narain Singh Deo*[14]

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1. (1841) 4 Beavan, 184.
2. (1852) 16 Beavan, 147.
3. (1897) I. L. R. 24 C. 440, at pp. 446 & 447.
4. (1909) I.L.R. 36 C. 1003 (P.C.)
5. (1892) I. L. R. 20 C. 371.
6. (1865) 4 B. L. R. Appendix, 57.
7. (1881) I. L. R. 7 C, 577.
8. (1869) 12 W. R. 160.
9. (1874) 22 W R. 333.
10. (1876) 25 W. R. 353.
11. (1897) I. L. R. 24 C, 575. at pp. 582, 583 585,
12. (1907) I. L. R. 34 C, 1026.
13. (1889) I.L.R. 12 A. 51 (P.C.)
14. (1905) I. L. R. 33 C. 54.

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Barahi Debi v. Deb Kamini Debi [1]; *Ram Mohan Lal* v. *Mul Chand* [2]; *Ram Charan* v. *Ajudhia Prasad* & *Jasodha* [3], and *Subbrazu* v. *Ratnam* [4].

De Gruyther, K. C, was allowed to further refer to the Bengal Tenancy Act (VIII of 1885), Ss. 3 and 188.

The Judgment of their Lordships was delivered by

Sir Arthur Wilson.—This is an appeal from the judgment and decree of the High Court of Calcutta, dated the 5th May 1905, which reversed those of the Subordinate Judge of Gaya, dated the 4th February 1904. The sole question for decision on the appeal is whether the appellants are entitled to partition of certain properties, as against the opposing respondents.

In order to dispose of this question, it is sufficient to deal very broadly with the facts. It is enough to say that the appellants are proprietors of a *mokurari* interest in the properties in question, the opposing respondents being owners of a fractional share in zemindari interest in the same properties.

In the judgment appealed against it was held, in accordance with an earlier decision of a Full Bench of the same Court, that the fact of the party on one side of the dispute being in a lower grade of title than those on the other side was not necessarily a bar to partition.

Their Lordships agree with the opinion of the Full Bench in the case referred to, that the right of partition exists when two parties are in joint possession of land under permanent titles, although those titles may not be identical. It is unnecessary for their Lordships to consider whether a right to partition exists in any other case, and they are desirous to avoid indicating any view upon any such subject.

In the present case all parties concerned in the appeal have joint shares in the land, of course under different titles, and this has been recognised by the learned Judges whose decision is under appeal. But those learned Judges held that the right of partition, which would otherwise have belonged to the appellants, the *mokuraridars*, was lost by reason of the fact that

1. (1192) I. L.R. 20 C. 682.
2. (1905) I. L. R. 28 A. 39.
3. (1905) I. L. R. 28 A. 50.
4. (1891) I. L .R. 15 M. 234.

their *mokurari* is liable to forfeiture in certain contingencies, and therefore is lacking in the permanence of interest necessary to support a claim for partition. Their Lordships are of opinion that the distinction thus introduced cannot be supported.

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The title of the appellant is a permanent title, though liable to forfeiture in events which have not occurred, and the rights incidental to that title must, in their Lordships' opinion, be those which attach to it as it exists, without reference to what might be lost in future under changed circumstances.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the judgment and decree of the High Court should be set aside and that of the Subordinate Judge restored with costs in the Court below.

The opposing respondents will pay the costs of the present appeal.

Solicitors : Messrs. *T. L. Wilson* & *Co.* for the appellants.

Solicitors : Messrs. *Broughton, Broughton and Holt* for the respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present:—Lord Atkinson, Lord Shaw, Sir Arthur Wilson and Mr. Ameer Ali.

Debi Bakhsh Singh .. Appellant*

v.

Chandrabhan Singh .. Respondent.

Debi Bakhsh Singh *v.* Chandrabhan Sing

Oudh Estates Act (*I of* 1869), *Ss.* 8, 22, 23—*Intestate succession—Sannad—"Rule of primogeniture."*

In a case of disputed succession to the Taluq of an Oudh Taluqdar where there was a declaration in the Sannad conferred in 1860 A. D. by the Government upon the grantee, whose name was entered in Lists 1 and 5 of Section 8 of the Oudh Estates Act (I of 1869), that the succession to the estate comprised in the Sannad should be regulated by the "rule of primogeniture" :

Held, that the "rule of primogeniture" was the rule of lineal primogeture.

Held, also, that under Act I of 1869 the succession to a Taluq must be to an impartible estate, whether the estate "ordinarly devolved upon a

*1910 June 7 and 8 and July 10.

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single heir" as in List 2, or whether the succession was to be regulated by the rule of lineal primogeniture as in Lists 3 and 5.

[*Dewan Rau Bijai Bahadur Sing* v. *Rae Jagatpal Sing* and *Rae Bisheshur Bakhsh Sing* v. *Dewan Rau Bijai Bahadur Sing* [1] and *Jagdish Bahadur* v. *Sheo Pertab Singh*[2] followed.]

Held, further, that the specific order of heirs described in the first ten sub-sections of S. 22 of Act I of 1869 must stand as a statutory substitute of the line of sucession set forth in the Sannad; and that Sub-S. 11 of that section relegated the parties to the situation in which they would have been found apart from the Act.

Held, finally, that the succession must be regulated according to the line of succession set forth in the Sannad and accordingly the respondent was entitled to succeed under the rule of lineal primogeniture. [*Brij Indar Bahadur Singh* v. *Ranee Janki Koer*; *Lal Shunkur Bux* v. *Ranee Janki Koer*; and *Lal Sutla Bux* v. *Ranee Janki Koer* [3] referred to.]

Act I of 1869, S. 23 discussed.

Appeal against the decree of the Judicial Commissioners of Oudh, dated 5th July, 1907, which varied a decree of the Subordinate Judge of Tahsil Biswan, District Sitapore, dated 13th September, 1906.

The said suit was brought by the plaintiff, respondent, as the heir of his cousin, Raghuraj Singh, for the possession of the estate left by him. The estate consisted of the taluq of Rajpur and other lands, of which the defendant, appellant, had obtained possession on the death of the widow of Raghuraj Singh.

The Subordinate Judge held that the plaintiff was not entitled to inherit any part of the estate, and dismissed his suit. The Judicial Commissioners, on appeal, reversed that decision as to the taluq of Rajpur, but affirmed it as to the rest of the estate.

The present appeal related to the taluq of Rajpur alone.

In 1860 the Taluq of Rajpur was granted by Government to the said Raghuraj Singh under a *Sanad*, which contained the following provision:—"It is another condition of this grant that, in the event of your dying intestate, or any of your successors dying intestate, the estate shall descend to the nearest male heir, according to the rule of primogeniture." The name of Raghuraj Singh was entered in the first and fifth of the lists mentioned in the Oudh Estates Act (I of 1869), S. 8. Raghuraj Singh died intestate, and without issue, in 1892, whereupon the said taluq

1. (1890) I. L. R. 18 C. 111 (P. C.) 2. (1901) I. L. R. 23 A. 369 (P.C.)
3. (1877) L. R. 5 I. A. 1, s. c. 1. C. L. R. 318.

and the rest of his estate passed into the possession of his widow. On her death which took place in 1904, the defendant, who was a first cousin of Raghuraj Singh, entered on the whole estate claiming to be entitled thereto according to the ordinary law of inheritance under the Mitakshara, as being the nearest reversioner. The plaintiff was a nephew of the defendant, being the son of his elder brother, who had pre-deceased Raghuraj Singh's widow. He claimed to be entitled to succeed in preference to the defendant under the rule of lineal primogeniture which was, as he contended, applicable to the taluq of Rajpur under the said Sannad and the Oudh Estates Act, 1869, and to the rest of the estate under a family custom.

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On the 14th November, 1905, the plaintiff instituted the present suit against the defendant, asserting the above claim, and praying for possession of the entire estate of Raghuraj Singh, comprising the taluq of Rajpur and other villages and lands, with mesne profits. The defendant put in a written statement denying *inter alia* that the succession to the estate or any part of it was governed by the rule of lineal primogeniture by custom or otherwise.

The Courts in India had agreed in finding that the family custom asserted by the plaintiff was not proved. They had agreed in further holding that the plaintiff was not entitled to the estate of Raghuraj Singh other than the taluq of Rajpur. With regard to that taluq the Subordinate Judge held, after referring to the *Sannad* and the Oudh Estates Act, 1869, that the succession thereto was not governed by the rule of lineal primogeniture and he accordingly dismissed the suit. The Judicial Commissioners, on the appeal preferred by the plaintiff, reversed the decision as to the said taluq, being of opinion that the rule of succession to be applied was the rule of lineal primogeniture and the plaintiff was accordingly entitled to succeed. They, therefore, passed a decree for the plaintiff for possession of the said taluq with mesne profits.

Against that decree the present appeal had been preferred by the defendant.

G. E. A Ross (with him *B. Dube*) for the appellant: The respondent cannot claim the estate under the terms of the

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Sannad granted to Raghuraj because it was superseded by Act I of 1869. Even assuming that the respondent's claim under the terms of the Sannad is admissible, the language of the Sannad fails to show that succession according to lineal primogeniture was intended. When Clause 11 of S. 22 of Act I of 1869 is reached, the estate does not descend as an impartible estate, and therefore, the rule of primogeniture—much less lineal primogeniture—does not apply. Even if it descends as an impartible estate, in the present case, succession is not governed by the rule of lineal primogeniture, but it is regulated by the Hindu law, and the estate devolves upon the nearest male heir; *i. e.*, the appellant, who was alive when the widow Rani Brijnath Kunwar died. Reference was made to the Oudh Estates Act (I of 1869) Ss. 2, 8 10 and 22; The Oudh Estates Act (I of 1869) as amended by Act X of 1885, and the Oudh Settled Estates Act (II of 1900) edited by R. G. F. Jacob (Lucknow, 1903) p. 103; Compendium of Oudh Taluqdari Law, by J. G. W. Sykes, pp. 80, 81 and 101; *Achal Ram* v. *Udai Partab Addya Dat Singh*[1]; *Narindar Bahadur Singh* v. *Achal Ram*[2]; *Balbhadhar Singh* v. *Sheo Narain Singh*[3]; *Brij Indar Bahadur Singh* v. *Ranee Janki Koer*, *Lal Shunkur Bux* v. *Ranee Janki Koer*, and *Lal Sulta Bux* v. *Ranee Janki Koer*[4]; *Dewan Rau Bijai Bahadur Singh* v. *Rae Jagatpal Singh* and *Rae Bisheshar Baksh Singh* v. *Dewan Rau Bijai Bahadur Singh*,, and *Rae Jagatpal Singh*[5]; and *Jagdish Bahadur* v. *Sheo Partab Singh*[6].

De. Gruyther, *K. C.* (with him *K. Brown*) for the respondent:—Succession in this case is governed by the rule of lineal primogeniture. The rule of primogeniture in the Sannad and in Lists 3 and 5 of S. 8 of Act I of 1869, means the rule of lineal primogeniture. The Sannad is the root of the title to the estate, and the rights of the parties under it must be included within the meaning of the terms of Clause 11 of S. 22 of Act I of 1869. The judgment of the lower Court is right and the appeal should be dismissed. Reference was made to the Oudh estates Act (I of 1869) Ss. 8 and 22; *Thakur Sheo Singh* v. *Rani Raghubans*

1. (1883) I. L. R. 10 C. 511 (P.C.)
2. (1893) I. L. R. 20 C. 649 (P.C.)
3. (1896) I. L. R. 27 C. 344 (P.C.)
4. (1877) I.L.R. 5 I. A. 1 S.C. 1 C. L. R, 318.
5. (1890) I. L. R. 18. C. 111 (P.C.)
6. (1901) L. R. 28 I. A. 100,

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Kunwar[1]; *Dewan Rau Bijai Bahadur Singh* v. *Rae Jagatpal Singh* and *Rae Bisheshar Baksh Singh* v. *Dewan Rau Bijai Bahadur Singk* and *Dewan Rae Jagatpal Singh*[2] *Jagadish Bahadur* v. *Sheo Partab Singh*[3]; *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer*[4]; *Haidar Ali* v. *Tassaduk Rasul Khan*[5]; *Achal Ram* v. *Uadi Pertab Addiya Dat Singh*[6] *Maindar Bahadur Singh* v. *Achal Ram*[7]; *Brij Indar Bahadur Singh* v. *Ranee Janki Koer*, *Lal Shunkur Bux* v. *Ranee Janki Koer* and *Lal Sutla Bux* v. *Ranee Janki Koer*[8] and Compendium of Oudh Taluqdari Law, by J. G. W. Sykes, pp. 389, 386 and 391.

Ross, in reply, further referred to MAYNE on HINDU LAW AND USAGE, 7th Ed., pp. 742 and 743, Ss. 545 and 546; Compendium of Oudh Taluqdari Law by J. G. W. Sykes, pp. 269, 270 and 314; and Oudh Rulings of the Judicial Commissioners and Financial Commissioners of Oudh from 1859 to 1893 2nd Ed., by Munshi Jwala Prasada, *Lal Sutla Baksh Singh* v. *Rani Janki Koer*, p. 7. No. 10 (1874), and *Babu Abul Kasim Khan* v. *Babu Hari Singh and others*, p. 126, No. 171 (1890).

The Judgment of their Lordships was delivered by

Lord Shaw.—This suit had reference to the succession to more than one estate, but the issue which remains contested on this appeal has regard solely to the taluk of Rajpur Keotana and other lands of which the defendant (appellant) had obtained possession on the death of the widow of one Raghuraj Singh.

The respondent as plaintiff brought a suit against the appellant to obtain possession from him of that taluk. The Subordinate Judge, on the 13th September 1906, dismissed the suit. On the 5th July 1907, this judgment was reversed by a decree of the Judicial Commissioners of Oudh, and against that decree the present appeal is made.

The situation of the parties is thus briefly described:—The Rajpur Keotana estate was conferred upon Raghuraj Singh by a Government *Sannad* in the year 1860. Raghuraj Singh's name was entered in Lists 1 and 5, mentioned in the Oudh Estates Act, 1869, S. 8. Raghuraj Singh died intestate and without

1. (1905) I.L.R. 27 A. 634 (P.C.)
2. (1890) I.L.R. 18 C. 111 (P.C.)
3. (1901) I.L.R. 23 A. 369 (P.C.)
4. (1877) I.L.R. 3 C. 626 (P.C.)
5. (1890) I.L.R. 18 C. 1 (P.C.)
6. (1890) I.L.R. 10 C. 511 (P.C.)
7. (1893) I.L.R. 20 C. 649 (P.C.)
8. (1877) I.L.R. 5 A. 1. S.C. 1 C.L.R. 318.

issue in 1892. His estate passed into the possession of his widow, and her death occurred in 1904. The succession in the taluq to Raghuraj Singh is contested as between Debi Bakhsh Singh, defendant, and Chandrabhan Singh, plaintiff. Excluding therefrom the items which are irrelevant to the issue raised in this case, one may adapt the table of relationship from the appellant's case thus :—

CHANDRAKA BAKHSH SINGH.

- Ram Narain Singh
  - Beni Madho Singh
    - Raghuraj Singh (widow Rani Brijnath Kunwar)
- Gur Bakhsh Singh
  - Sheo Gopal Singh
    - Chandrabhan Singh (Plaintiff).
  - Debi Bakhsh Singh (Defendant)

It is thus seen that the plaintiff would be entitled to succeed to Raghuraj Singh under the rule of lineal primogeniture, but that the defendant (his uncle) would be entitled to succeed were the rule adopted not that of lineal primogeniture but of nearness in degree. The issue in this case is which of these rules governs the rights of the parties.

The case was treated by the Courts below and in argument as one of great general importance as determining the rules of intestate succession to the Talukdars of Oudh; and it is no doubt true that, while both parties appeal to the provisions of the Oudh Estates Act, 1869, an apparently serious repugnancy arises on a contrast of the provisions of S. 8 and S. 32 of that statute.

By the 8th Section it is provided that:—

"Within six months after the passing of this Act, the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor-General of India in Council, shall cause to be prepared six lists, namely :"—(and then follow the lists in their order).

It is an admitted fact in the present case that Raghuraj Singh, whose succession is in question, had in 1860 the Rajpur Keotana estate conferred upon him, and that his name was entered in List 5 as well as List 1. List 1 was of a general character, namely :—

"1st : A list of all persons who are to be considered Taluqdars within the meaning of this Act."

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List 5 was as follows:—

"5th : A list of the grantees to whom Sannads or grants may have been or may be given or made by the British Government up to the date fixed for the closing of such list, declaring that the succession to the estates comprised in such Sannads or grants shall thereafter be regulated by the rule of primogeniture."

Up to that point their Lordships do not think that any substantial difficulty would arise in the case What appears to be contended for is that some other rule of primogeniture than the rule of lineal primogeniture should be applied. In the first Court a certain custom was appealed to, to make clear or illustrate what variation from lineal primogeniture was meant, but no success attended that plea, and it was not maintained at their Lordships' Bar. In their opinion, the language of the Sannad emanating from the British authority was simply language conveying the ordinary meaning of the word " primogeniture" in the law of England.

A much more serious difficulty arises on the construction of S. 22. That Section provides:—

" If any taluqdar or grantee whose name shall be inserted in the second, third or fifth of the lists mentioned in S. 8, or his heir or legatee, shall die intestate, as to his estate, such estate shall descend as follows :"—

There are then inserted ten specific rules of successsion beginning, of course, with the right of succession of the eldest son. These need not be stated in detail, but two observations occur to their Lordships as important with regard to them. First, it is entirely clear that the estate, the succession to which was there being dealt with, was from beginning to end of these sections dealt with as an impartible estate, and, secondly, the preservation of the estate as impartible appears to their Lordships to be in entire accord with the language and policy of the legislation. The social and historical reasons for this have been the subject of frequent exposition and need not be entered upon, the matter being concluded by authority as after referred to.

After these ten rules of descent have, however, been given in S. 22, there occurs the following Sub-Section, namely :—

" (11) or, in default of any such decendants then to such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar or grantee heir or legatee, are subject."

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It is maintained by the appellant that he is entitled to the succession because, by the ordinary law to which it must be supposed reference is here made, nearness in degree is preferable to lineal descent; and the contention accordingly comes to this, that Sub-S. 11 amounts to a revocation or an abrogation of the rule of succession laid down in the Sannad under which the taluqdar received his property, and that S. 8 of the Statute did not really amount to a declaration that the succession "shall thereafter be regulated by the rule of primogeniture," but only used that phrase in the course of a narrative identifying the fifth list of grantees. It is fairly clear, however, that, if a repugnancy does not arise within the statute itself, at least something which would have the same effect has been produced, namely, an inconsistency between the order of succession specified in the Sannad and some other law of succession under the ordinary law of taluqdars' religion and tribe; and it is maintained that in these circumstances the Statute, and the Statute alone, must govern.

The main authority for this proposition is the case of *Brij Indar Bahadur Singh* v. *Ranee Janki Koer*, *Lal Shunker Bux* v. *Ranee Janki Koer*, and *Lal Sutla Bux* v *Rane Janki Koer* [1] in which *Sir Barnes Peacock* said :—

"As regards the succession their Lordships are of opinion that the limitation in the Sannad was wholly superseded by Act 1 of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of S. 22 of that Act. By that section it was enacted that, if any such taluqdar whose name should be inserted in the second, third, or fifth of the lists mentioned in S. 8 or his heir or legatee should die intestate, such estate should descend in manner therein described."

Now, it has to be observed that, with reference to all the authorities cited, no one of them has decided the question now submitted in this appeal or any question as to lists 3 or 5. The case just referred to was a case in which the name of the taluqdar was entered upon lists 1 and 2.

On the point of whether the estates of taluqdars must for the purposes of intestate succession, be treated as impartible, their Lordships hold that that matter is definitely settled by decision. In the appeal of *Dewan Rau Bijai Bahadur Singh* v. *Rae Jagatpal Singh* and *Rae Bisheshar Baksh Singh* v. *Dewan Rau Bijai Bahadur Singh* and *Rae Jagatpal Singh*[2], *Sir*

1. (1877) L. R. 5. I. A. 1.S. C. 1 C,L.R. 318

2. (1890) I. L. R, 18 C. 111 (P.C.)

Barnes Peacock, delivering the judgment of the Privy Council, said :—

"A question might arise upon the construction of Cl. 11 of S. 22 whether the estate descended as an impartible estate. Their Lordships are of opinion looking to the provisions of Act I of 1869, List 2, S. 8 and S. 22, that it was the intention of the Legislature that the estate should descend as an impartible estate."

Again, in *Jagdish Bahadur* v. *Sheo Pertab Singh*[1], the same law was affirmed in terms in the judgment of *Lord Davey* and the point taken to be concluded by authority.

It cannot, accordingly, in the first place be denied that, giving full effect to Act I of 1869, the succession to a taluq must be to an impartible estate and that whether the estate "ordinarily devolved upon a single heir," to quote the language of List 2 of S. 8, or whether the succession was to be regulated by the rule of primogeniture, to quote Lists 3 and 4 of S. 8.

In the second place, it can hardly be doubted that S. 22, in so far as it describes in the first ten of its sub-sections the specific order of heirs preferred to the succession, must have force given to it to the effect of standing as a statutory substitute for any line of succession which might have been set forth in the Sannad.

In the third place, when Sub-S. 11—a sub-section which comes at the close of the long list of specific stages of prescribed succession—sets up the rule that, in default of any one taking under the previous sub-sections, there should be preferred—

"Such persons as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such taluqdar or grantee heir or legatee, are subject"

their Lordships do not see their way to hold that this is anything else than a general relegation of parties to the situation in which they would have been found apart from the Statute.

But that situation is found in the Sannad itself, and it is also contained, either by way of affirmance or at least by way of narrative, in the fifth list of S. 8 of the Statute. So far as the Sannad was concerned, the provision was as follows :—

"It is another condition of this grant that, in the event of your dying intestate, or any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture."

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1. (1901) I. L. R. 23 A. 369 (P.C.)

Debi Bakhsh Singh v. Chandra-bhan Singh.

While, as has been said, the specific rules of succession in Act I of 1869 must be held to displace this, the general reference to what is not covered by those specific rules must include a reference to the rights of parties as contained in the Sannad, which was the original title to the property.

By this simple construction the alleged repugnancy disappears.

It must be added, with reference to the body of decisions cited in the judgments of the Courts below and at their Lordships' Bar, that, as these decisions refer to the property descending, in the language of List 2, to "a single heir," there was therefore necessitated the search for that heir according to the law of the religion and tribe as referred to in S. 22, Sub-S. II. But it does not appear that the ordinary law of the religion and tribe would have fixed upon any different person as entitled to succeed where the "rule of primogeniture" had been the acknowledged rule of the succession—any different person from the respondent and plaintiff in this suit, who has succeeded under the judgment of the Judicial Commissioners.

If reference be made to S. 23, the result reached is the same. That section provides that

"Except in the cases provided for by S. 22, the succession to all property left by Taluqdars and Grantees, and their heirs and legatees dying intestate shall be regulated by the ordinary law to which members of the intestate's religion and tribe are subject."

This expression, *viz.*, that

"The succession shall be regulated by."

is the same form of words as that employed in the list 5 of S. 1 which declared, of *inter alia* the present succession, that it "should be regulated by the rule of primogeniture."

This declaration and condition of the Sannad, being part of the original title to the property, is an essential part of that regulation of the ordinary law of the religion and tribe, and would have been respected accordingly.

For these reasons their Lordships will humbly advise His Majesty that the judgment passed by the Court of the Judicial Commissioner of Oudh, dated the 5th July 1907, is correct, and that the appeal should be dismissed with costs.

Solicitors: *Barrow, Rogers and Nevill* for the appellants.

Solicitors; *T. L. Wilson & Co.* for the respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Singaram Pillai & others .. Appellants*

v.

Hazarath Kibulai Syed Gulam Ghouse Sha Sahib Kadir .. Respondent.

Singaram v. Gulam Ghouse.

Limitation Act, Art. 110—"*Ascertained rent*"—*Suit for enforcement of acceptance of patta—Decision by High Court declaring terms of patta rather permanently in a prior regular suit by tenant—Termination of summary suits.*

A landholder tendered patta for Fasli 1311 on the last day of the fasli ; and, on the tenant's refusal to accept it, instituted a summary suit for enforcement of acceptence of patta. During the pendency of the summary proceedings, the High Court declared, on 7th August 1902, the terms of the patta in certain regular proceedings instituted by the tenants, subject of course to variation if circumstances justifying it arise. The summary suits were disposed of finally and formally in terms of the High Court judgment only on 24th May 1904. The present suits were instituted just on the date of the expiry of the three years period from 24th May 1904.

Held :—That the rent for Fasli 1311 in respect of which summary proceedings were pending became "ascertained" only on the date of the formal determination of the summary suits and not on the date of the High Court judgment. [*Rangayya Appa Row* v. *Bobba Sriramulu*[1], followed. *Arunachalla Chettiar* v. *Kadir Rowther*[2], distinguished.]

Appeals under S. 15 of the Letters Patent against the judgment of the Hon'ble the Chief Justice in C.R.P. Nos. 739 to 745 of 1907 presented against the decrees of the District Munsif of Valangiman in S. C. S. Nos. 620 to 624 and 626 of 1907 respectively.

The facts appear from the judgment of the Chief Justice.

T. Rangachariar, *K. Ramachandra Aiyar* and *S. Muthiah Mudaliar* for appellants.

S. Srinivasa Aiyar for respondent.

The Court delivered the following

JUDGMENT :—We think the conclusion the learned Chief Justice has arrived at is correct. Pattah for the suit *fasli* was tendered before the judgment of the High Court—Exhibit C—was pronounced. As the pattah tendered was not in accordance with the judgment of the High Court the plaintiff could not successfully maintain a suit for rent upon it and he could not tender a fresh pattah as the *fasli* had by then

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* L. P. A. Nos. 12 to 17 of 1910. 18th October 1910.

1. (1903) I.L.R. 27 M. 143 (P.C.) 2. (1906) I.L.R. 29 M. 556.

† *Vide* p. 528.

Singaram v. Gulam Ghouse.

expired. His only course in this case was to sue under S. 9 of Act VIII of 1865 to enforce acceptance of the pattah tendered. This he did do and he had to await an adjudication under S. 10 of the Act, and we think that limitation runs from the date of that adjudication, as it was only then that it can be said that the rent for the suit *fasli* was ascertained—*Rangayya Appa Rao* v. *Bobba Sriramulu.*[1] We express no opinion as to the effect of the High Court's judgment in the case of *faslis* subsequent thereto.

The appeals are dismissed with costs.

The judgment of the *Chief Justice* was as follows:—

These are suits for rent, and the Munsif, sitting as a Small Cause Judge, has decided that the suits are barred by limitation. The question I have to consider is: Was he right in law in so holding? The tenants say that the suits are barred because the arrears became due within the meaning of Article 110 of the Second Schedule to the Limitation Act on the date of a judgment which was delivered on a first appeal by this Court, the date of the judgment being the 7th August 1902. The landlord says that the arrears did not become due within the meaning of that article until a later date, *viz*., the 24th May 1904, that being the date of judgment by the Sub-Collector in certain proceedings before the Revenue Court under the Rent Recovery Act. The judgment of the High Court to which I have referred is a judgment in a suit in which the tenants sued the landlord for a declaration that the landlord was not entitled to vary the terms of previous pattas — the pattas in that suit relating to the same lands as the lands for which rent is now sought to be recovered in the present suits. The judgment by the Revenue Court was a judgment in a suit by the landlord in the Revenue Court which was instituted in 1902 and in which, as I have said, judgment was given by the Sub-Collector on the 24th May 1904. The Munsif, in deciding that the suits were time-barred, has relied upon the decision of this Court in *Arunachella Chettiar* v. *Kadir Rowthen*[2] in which the learned Judges distinguished the case before them on the facts from the decision of the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu*[1]. If the present case is on all fours with the case *Arunachella Chettiar* v. *Kadir Rowthen*[2], sitting as a single Judge, I should of course follow it. But it seems to me that the present case is not on all fours with *Arunachella Chettiar* v. *Kadir Rowthen*[2]. That is a case in which the circumstances are somewhat special and in which it was shown that by custom the rents were payable in kind, not at the end of the Fasli, which I understand to be the ordinary rule but at the time of

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1. (1903) I. L. R. 27 M. 143 (P.C.)

* 1st February 1910.

2. (1906) I. L. R. 29 M. 556.

Singaram v. Gulam Ghouse. — Chief Justice.

the harvest. And it was there held that the rent was ascertained as soon as the harvest was reaped. The question I have to determine is, not whether rent was ascertained at the end of the Fasli, but whether the rent was ascertained at the date of the judgment of the Sub-Collector in the Revenue proceedings brought by the landlord. Consequently, it seems to me I am not bound by the decision in *Arunachalla Chettiar* v. *Kadir Rowthen*[1]. When I go back to the decision of the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu*[2]. It must be borne in mind that in the present cases, the Revenue proceedings were pending at the date of the judgment in the High Court in the suits by the tenants. I am not at all satisfied that the judgment in the declaratory suit by the tenants did determine once and for all the rate of rent which was payable in respect of these lands. The declaration given is in somewhat guarded terms. At the end there is this provision : "A general declaration will not, of course, prevent either party from claiming a modification of the patta, should circumstances arise." But even supposing that this judgment did determine the rate of rent it does not seem, to me, to necessarily follow from that, that in the state of things which existed here, where at the date of the judgment of the High Court, proceedings properly brought by the landlord were pending in the Revenue Court, the date of the judgment of the High Court must be the date from which the statute of limitation begins to run as against the landlord.

In *Rangayya Appa Row* v. *Bobba Sriramulu*[2] their Lordships, after examining the provisions of the Rent Recovery Act say: " Under this procedure it seems clear that so long as proceedings are pending before the Collector and on appeal from him before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and that therefore no arrear of rent can be said to have become due within the meaning of the Limitation Act." I think I must apply that proposition to the facts here. Of course it is argued that the rate of rent is not in suspense because it has been held that it is a certain amount in the High Court proceedings. I say I am not satisfied as to that. My attention has been drawn on behalf of the tenants to another passage : " In their Lordships' opinion this whole series of sections applies to ascertained rents, not to rents at rates which have yet to be determined." That passage in the judgment occurs after the examination of the provisions of the Rent Recovery Act. And I think when their Lordships speak about "ascertained rent' they mean rents which have been ascertained by means of the procedure provided by the Rent Recovery Act.

Now it is beyond question that a landlord cannot get his rent until he has tendered a puttah in which the rent is accepted or with regard to which the Courts have held that he is bound to accept it. And I think it is anomalous that limitation should

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1. (1906) I. L. R. 29 M. 556. 2. (1903) I. L. R. 27 M. 143. (P.C.)

Singaram v. Gulam Ghouse. — Chief Justice.

begin to run against him at a date anterior to the date when he can enforce his claim for rent.

I think the Munsif was wrong in his view of the law.

In C. R. P. Nos. 739, 740 and 743 the decrees of the Munsif will be set aside and the cases will go back to be dealt with according to law. Costs will abide the event.

C R. P. No. 744 is dismissed with costs.

In C. R. P. Nos. 741, 742 and 745 there will be a decree for rent with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MDRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Padmanabhaya and others .. Appellants *

v.

Ranga and others .. Respondents.

Padbanabhayya v. Ranga.

T. P. A., Ss. 112, *Cl.* (*g*), 111—*Ejectment suit—Lease before the Act—Concurrent suit for rent—No waiver of forfeiture—" Act showing intention to determine lease."*

A forfeiture is incurred if the landlord's title is denied. It is not necessary that the denial of the landlord's title should be accompanied by an assertion that the title is either in the defendant or some third person.

Where a lease is determined by the plaintiff's election to treat the lease as at an end, a claim for rent prosecuted along with a prayer for ejectment could not negative the plaintiff's title to seek ejectment.

In the cases of leases before the Transfer of Property Act, the institution of the action for ejectment on the ground of forfeiture would itself amount to the manifesting of the intention to determine the tenancy, though in the cases of leases after the Act, it is impossible to treat the institution of the suit as itself the act necessary for determining the tenancy. *Venkataramana Bhatta* v. *Gundaraya*[1] *considered.*

Second appeal from the decree of the District Court of South Canara, in A. S. No. 167 of 1907, presented against the decree of the Court of the District Munsif of Kundapur, in O. S. No. 486 of 1906.

Suit for possession as on a forfeiture by denial of a title, plaintiff being himself a permanent lessee, and the defendant a permanent sub-lessee under him. The alleged denial of title was by the 1st defendant, the admitted *Ejaman* of the family, and was contained in a reply sent by him to a letter of the plaintiff demanding rent. It was in these terms: " I do not enjoy any property under you. I am not liable to pay any rent whatever

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* S. A. No. 1861 of 1908. 1st April 1910.

1 (1908) I. L. R. 31 M. 403.

Padmanabhayya v. Ranga.

to you. I have never till now paid any rent to you whatsoever." In the written statement the defendants persisted in making the very same allegation but subsequently admitted plaintiff's title and offered to pay rent minus an amount of Rs. 2-12-0 which they used to pay a mortgagee of the landlord of plaintiff. The Munsiff held that the defendants were not paying rent to the plaintiff, and did not know that he was their landlor till they came to admit, and therefore there was no *mala fides* in their denying the title, and accordingly refused to pass a decree for possession. As to the rent he passed a decree for the admitted amount, refusing to pass a decree for the balance on the ground that the plaintiff himself had not paid the mortgagee and the defendants were ready and willing to pay him. On appeal the District Judge held that the defendants were aware of the plaintiffs' title and had been paying rent, but all the same dismissed the suit forpossession on three grounds: (i) that though there was denial of plaintiffs' title there was no setting up of a third party's title or of his own title and therefore no forfeiture was incurred; (ii) that there was no act antecedent to the plaint determining the tenancy; (iii) that by claiming future rent in the suit, plaintiff had waived forfeiture. As to rent also he confirmed the Munsiff's judgment. Plaintiff appealed.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

B. Sitarama Rao, for appellant, contended—(i) that there was a sufficient denial of title so as to attract the consequence of forfeiture *Doed Bennett* v. *Long*[1]; WOODFALL, p. 388, (18th Edn.). (ii) No act antecedent to suit is necessary *Venkataramana Bhatta* v. *Govindaraj*[2] and *Anandhmoyee* v. *Lakchichandra Mitra*[3] are, no doubt, against this view. But they proceed on the Transfer of Property Act, though the former is a case not governed by the Act. Even under the Transfer of Property Act, an act antecedent to suit is not necessary. The law as stated in books of English law does not differ from S. 111 of the Transfer of Property Act. See COLE on *Ejectment*, p. 408. Still, it has been held under the English law, that no act antecedent to the suit is necessary. COLE on *Ejectment*, p. 408. By

1. (1841) 9 C. & P. 773. 2. (1908) I. L. R. 31 M. 403.
3. (1906) I. L. R. 33 C. 339.

Padmanabhayya v. Ranga.

forfeiture, the lease becomes voidable at the election of the landlord—WOODFALL (18th Edn.) p. 520, COLE on *Ejectment*, p. 408 ; *Vithu* v. *Dhondu*[1] and this election can be exercised by the plaintiff as in the case of fraud *Clough* v. *London and North Western Railway Company*[2] ; of forfeiture in the case contract *Hyde* v. *Watts*[3]; by the plaint or written statement, without any antecedent act *in pais* see *Clough* v. *London and N. W. Railway Company*[2]. The same rule applies to the case of widow's alienations which are voidable at the instance of the reversioner, *Bijoy Gopal and Mukerji* v. *Krishna*[4]; or election in the case of appropriation of payment "*The Mecca*" *case*[5]. Action itself is equivalent to entry and determines the tenancy, *Serjeant* v. *Nash Field and Company*[6]; *Doed Lawrence* v. *Shawcrass*[7]; *Greenwood* v. *Moss*[8]. As for waiver, here it is only a claim for future mesne profits,and even if otherwise, it has been held in S.A. 905 of 1905 that a joinder does not amount to a waiver. As to the rent the defendants admittedly paid only on behalf of plaintiff as a part of the rent due to him under the contract..

K.Y. Adiga contended (i) that there was no denial by setting upthe tenants' adverse title or third party's title; the so called denial only amounts to a statement of ignorance as to the right of the plaintiff and an invitation to establish it; (ii) that the denial being only by one though *yejman* cannot affect the others; (iii) that there was a waiver *Evans* v. *Davis*[9]. He also contended that the rule of Transfer of Property Act ought to be applied as a rule of equity and good conscience and cited *Kadir* v. *Nepean*[10]; *Parameshri* v. *Vittappa Shanabhaga*[11]. He contended that as to rent, a contract ought to be inferred and must be taken to have been inferred in the lower Court.

B. Sitarama Row for appellant, in reply, contended that the law as laid down in the Transfer of Property Act cannot apply at least so for as leases before that Act are concerned—S. 2 of the Transfer of Property Act; *Narayana Sanabhogav*. *Narayana Nayak.*[12]; *Subbaroya Kamti* v. *Krishna Kamtt.*[13]; *Narayana*

1. (1890) I. L. R. 15 B. 407.
2. (1871) L.R. 7 Exch. 26 at pp. 34, 35, 36.
3. (1843) 12 M. & W. 254 at 270.
4. (1907) I. L. R. 34 C. 329 (P.C.)
5. (1897) A. C. 286 at 294.
6. (1903) 2 K. B. 304.
7. (1825) 27 R. R. 466.
8. (1872) L. R. 7 C. P. 360.
9. (1878) L. R. 10 Ch. D. 747.
10. (1898) I. L. R. 26 C. 1.
11. (1902) I. L. R. 26 M. 157.
12. (1883) I. L. R. 6 M. 327.
13. (1882) I. L. R. 6 M. 157.

Padmanabhayya *v.* Ranga.

Naika v. *Vasudeva Bhatta*[1] *R. Vaguram* v. *Rangayyangar*[2]; *Kripa Sindhu Mukherji* v. *Annada Sundari Debi*[3]; *Varden Seth Ram* v. *Luckapathy Royjee Lallah*[4]; *Wagnela Rajsanji* v. *Shekh Masludin*[5].

The Court delivered the following

JUDGMENT:—The suit is in ejectment. The defendants are permanent lessees. They denied the title of the landlord, the plaintiff, by a notice dated the 28th August 1905, before the institution of this suit. The District Judge held that the terms of this letter did not create a forfeiture. He was also of opinion that the lessor had done no act to show his intention to determine the lease and further that the forfeiture had been waived by the lessor suing for the rent subsequent to the date of the forfeiture.

Dealing with the last question first, we observe that the prayer was for past and future profits and not for rent, though the rent previously fixed appears to have been taken as the measure of the annual profits. But apart from this, if the forfeiture had been incurred, we fail to see how the suit for rent could operate as a waiver. If S. 112 of the Transfer of Property Act applied, the suit in ejectment having been instituted, the second proviso to that section would prevent waiver even from acceptance of the rent. But the lease having been executed long before the Transfer of Property Act, the question is whether under the law in force before that Act, that claim for rent in the action for ejectment could operate as a waiver. We are not aware of any authority for holding, where the lease had determined by the plaintiff's election to treat the lease as at an end, that the claim for rent prosecuted along with a prayer for ejectment could negative the plaintiff's title to seek ejectment.

Exhibit G G. is the defendant's reply to the plaintiff's notice. It says:—"I do not enjoy any property under you. I am not liable to pay any rent whatever to you. I have never till now paid you any rent whatsoever." This certainly amounts to a claim of title in the defendants and would, therefore, work a forfeiture. In our opinion, it is not necessary that the denial of the landlord's title should be accompanied by an assertion in

1. (1903) I. L. R. 15 M L. J. 208.
2. (1891) I. L. R. 15 M. 210.
3. (1907) 6 C.L.J. 273.
4. (1862) 9 M. I. A. 307.
5. (1887) 14 I-A. 89.

Padmanabhayya. *v.* Ranga.

terms of the title of the defendant. If the landlord's title be denied, it involves the assertion that the title is either in the defendant or some third person,

The question remains whether the lessor had done some act showing his intention to determine the lease. As we have said already, the Transfer of Property Act does not apply to this case—Section 2, Clause (*c*). Clause (*g*) of S. 111, therefore, has no application. But the principle of that clause has been applied in *Venkatramana Bhatta* v. *Gundaraya*[1] to a lease executed before the Transfer of Property Act. In that case there was a *mulgeni* lease of 1866. There was a clause for re-entry on failure to pay rent on the due dates. On default in the payment of rent, the plaintiff sued for possession and for arrears of rent. Following the decision in *Anandamoyee* v. *Lakhi Chandra Mitra*[2] the Court held that the plaintiff had shown no intention to avail himself of the forfeiture and determine the lease and that in consequence he was not entitled to obtain possession. This was a case in which the forfeiture might have been relieved against on the principle of S. 114 of the Transfer of Property Act. But the Court held that no forfeiture had been incurred under S. 111, Clause (*g*). The decision in *Anandamoyee* v. *Lakhi Chandra Mitra* [2] was one under the Transfer of Property Act. It does not appear to have been brought to the notice of the Court in *Venkataramana Bhatta* v. *Gundaraya*[1] that the lease under consideration was not governed by the provisions of the Transfer of Property Act, having been executed in 1866. There was consequently no discussion in the Madras case as to the principles applicable to an action in ejectment on the ground of forfeiture of a tenancy created before the Act. We do not, therefore, feel bound to apply the principle of that decision to the present case.

Clause (*g*) of S. 111 provides that a forfeiture is incurred by a denial of title or by the breach of an express condition providing for re-entry when in either case the lessor does an act showing his intention to determine the lease. The lease, therefore, is not determined by forfeiture before the lessor has done an act showing his intention to determine the lease. As no cause of action accrues to sue in ejectment before the lease has determined,

1. (1908) I. L. R. 31 M. 403. 2. (1906) I. L. R. 33 C. 339

it is impossible to treat the institution of the suit as itself the act necessary for determining the tenancy. But does this rule apply to a lease not governed by the Transfer of Property Act? The forfeiture there was not incurred by the breach of the condition or denial of title coupled with the act of signifying the intention to determine the tenancy. It arose by the breach of the condition which provided for re-entry or by the setting up by the tenant of a title in himself or a third person. The tenant was not entitled to take advantage of his own wrong and claim any benefit from his own breach of a condition, but the landlord had the right of election which was signified by re-entry or by the doing of some other act showing an intention to put an end to the tenancy. But it was not necessary that this election should be anterior to the suit. The principles are well stated in WARVELLE on *Ejectment*, S. 47. "At Common Law, however, the condition was not self-executing but required some action on the part of the grantor, evincing an intention on his part to take advantage of the forfeiture, and, unless he was actually in possession, this was accomplished by a re-entry upon the land conveyed. The earlier cases in this country (the United States of America) follow the Common Law rule and announce the doctrine that re-entry for breach of a condition subsequent is necessary to defeat an estate of freehold which has once vested, and that a forfeiture cannot be effected merely by bringing an action for the recovery of possession. Under this doctrine, it will be seen that ejectment will not lie until there has been an actual re-entry. But later statutory enactments, defining the character of the action of ejectment and providing for the interests that shall be sufficient to sustain it, have materially altered the old rule by removing much of the reason which occasioned it, and it is no longer necessary that the Common Law ceremony of a re-entry shall be performed as a condition precedent to the prosecution of an action to recover possession of lands affected by a forfeiture." In *Goodright* v. *Cator*[1] Lord *Mansfield* delivering the Judgment of the Court of King's Bench said:—"We have looked very particularly into the cases for two hundred years back, and we find a great deal of contrariety on the question, whether an actual entry is necessary, in order to maintain an

1. (1780) 99 E. R. 304 at p. 309.

Padmanabayya v. Ranga.

ejectment, on a clause of re-entry, for non-payment of rent, but, in the most distant period, the better opinion has been that it is not. An ejectment being a mere creature of the Court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service. But if an entry was unnecessary, the doing of some unequivocal act, which was equivalent to entry such as a demise of the premises to a new tenant or a new demise to a tenant or sub-tenant in possession, was deemed to be sufficient." In WILLIAM and YATES on *Ejectment* p. 68, the learned authors say:—"Before the Common Law Procedure Act, 1852, the service of a declaration in ejectment was held to determine the lease. Since that Act the bringing of an action of ejectment was held to be equivalent to an entry and to determine the term. And since the Judicature Acts, *Fry* J. said that an action of ejectment was equivalent to the old entry"—*Evans* v. *Davis*[1]. In *Jones* v. *Carter*[2], *Parke* B. delivering the judgment of the Court of Exchequer said: "We think that the bringing of an ejectment for a forfeiture and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease." There the lessor served on the lessee a declaration of ejectment for a forfeiture. In a suit for rent due and for breach of certain covenants, it was held that the service of the declaration operated as a final election to determine the term though there had not been any judgment in the ejectment proceedings. In *Grimwood* v. *Moss*[3] where lessors brought ejectment against the tenant on the ground of forfeiture for breaches of covenants which provided for re-entry, it was held that a distraint for rent after commencement of the action and before trial did not operate as a waiver and the plaintiffs were entitled to judgment. In *Clough* v. *London and North-Western Railway Company*[4] dealing with a case of avoiding a transaction on the ground of fraud, Mr. Justice *Mellor*, delivering the Judgment of the Exchequer Chamber, observed:—"The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture. If with knowledge of the forfeiture, if by the receipt of rent or other unequivocal act, he

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1. (1878) 10 Ch. D. 747 at p. 763.
2. (1846) 71 R. R. 800 at p. 807.
3. (1872) 7 C. P. 360.
4. (1871) L. R. 7 Ex. 26 at p. 34.

Padmanabayya v. Ranga.

shows his intention to treat the lease as subsisting, he has determined his election for ever and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture." In *Sergeant* v. *Nash Field* & *Co.*[1] the Court of Appeal held that the issue and service of the writ to recover possession of the premises operated as a final election by the lessor to determine the term. The principle of these cases rests upon the ground that the forfeiture is complete when the breach of the condition or the denial of the title occurs. But as it is left to the lessor's option to take advantage of it or not, the election was not a condition precedent to the right of action, but the institution of the action was simply a mode of manifesting the election. The same principle has been applied in actions for relief on the avoidance of fraud as in *Clough* v. *London and North-Western Railway Cvmpany*[2] or where a reversioner avoids a lease by a Hindu widow after her life-time—*Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi.*[3] *See* FOA'S *Landlord and Tenant*, pages 322 and 656. It will be clear, on the foregoing review of the authorities, that under the law applicable to leases before the Transfer of Property Act, the institution of the action on the ground of forfeiture would itself amount to the manifesting of the intention to determine the tenancy. The defendants in the present action are, therefore, liable to be turned out of the property.

There is a dispute as to the amount of rent which the defendants were liable to pay. The Courts below allowed cash rent at the rate of Rs 12¼ per annum while the plaintiff claims Rs.15. The lease deed provides for an annual rent of Rs. 15 and sundry articles. The Courts below have deducted Rs. 2-12-0 as due to a mortgagee under a judgment, Exhibit *J*. The plaintiff was no party to the suit of the mortgagee in 1865 in which he was decreed two rupees and three quarters out of the rents payable by the defendant's predecessor to the plaintiff's predecessor in interest. It is not stated that the defendant has paid the mortgagee for the suit *fasli*. The plaintiff is, therefore, entitled to recover the full

1. (1903) 2 K. B. 304. 2. (1871) L. R. 7 Ex. 26 at p. 34.
3. (1907) I. L. R. 34 C. 329 (P.C.)

Padmanabayya v. Ranga.

rent provided for him under the lease. In reversal of the decrees of the Courts below, the plaintiff must have a decree for the properties sued for together with the profit claimed by him. The defendants will pay the plaintiff's costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Krishnaswami Aiyar.

Kolathathil Illatt Vishnu Nambudri, Karnavan of his Taiwad .. Appellant*
(*1st Defendant*)

v.

Meloothedathil Chulayakkari Akkamma Respondent
(*Plaintiff*).

Vishnu Nambudri v. Akkamma.

Nambudris—Self-acquired property—Succession to.

The self-acquisition of a Nambudri goes to his own natural heirs after his death and not to his illom. He can devise it or gift it away as he pleases.

The ordinary Hindu Law as expounded in the *Mitakshara* is applicable to the Nambudris except in so far as custom or usage has modified it.

Second appeal from the decree of the District Court of North Malabar in A. S. No. 283 of 1907 presented against the decree of the Court of the District Munsif of Taliparamba in O. S. No. 71 of 1906.

J. L. Rosario for appellant.

T. R. Ramachendra Aiyar for respondent.

The Court delivered the following

JUDGMENTS :—*Sankaran Nair* J.—The plaintiff sues to recover a debt contracted by the deceased Parameswaran Nambudri, a junior member of an Illom of which the 1st defendant is the head. His wife and child are also defendants.

Parameswaran Nambudri was in possession of a piece of land belonging to the family and it is found that he built thereon a house worth Rs. 1,000 out of his own funds and also planted

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* S. A. 1709 of 1908. 4th May 1910.

Vishnu Nambudri v. Akkamma — Sankaran Nair J.

pepper vines on the land. It was conceded in the lower Courts that the house, which was built by the deceased out of his own funds though on land belonging to the family, was his self-acquisition and the point is not raised by the memorandum of second appeal. We accordingly accept that finding.

As to the utensils &c., worth Rs. 500, they are in the house left by the deceased and were admittedly the property of the deceased. The first question is whether the self-acquisition of Parameswaran devolved on the family to which he belonged or on his son, the 4th defendant.

All the previous decisions were reviewed in *Chemmantha Attekunnath Lakshmi Amma* v. *Palakuzhu Thuppan Nambudri*[1] and the learned Judges therein arrived at the conclusion that the question is not concluded by authority and that there is no definite ruling of the High Court on the point.

As to the law applicable to the Nambudris, it has been held in a case, in which evidence was taken about their usage, that "Nambudris are governed by the Hindu Law, except so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu law as it stood at the date of 'their settlement' in Malabar 'though now obsolete' or some Marumakkathayam usage"—*Vasudevan* v. *The Secretary of State for India*[2].

The Hindu law is, generally speaking, the law laid down by the author of the Mitakshara. Under that law, though the interest of an undivided member in family property passes by survivorship to the other members of the family, his separate property devolves exclusively on his own heirs. The 4th defendant, the son of the deceased, takes the property of the latter under the Hindu Law to the exclusion of the other members of the family.

It is true, that under the Marumakkathayam law, we have decided that the self-acquisition of a male in Malabar lapses to his tarwad, but it has also been decided that in the case of a female, her children succeed to the exclusion of the tarwad,

1. (1902) I. L. R. 25 M. 662. 2. (1888) I. L. R. 11 M. 157 at 162.

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while in Canara, under the same law but with another name, where the theory is more strictly carried out in practice, the self-acquisitions of a male also descend to his own heirs. It may be noted that in the earliest case—*Kanara* v. *Ryrappa*[1]—of which there is any report, it is stated to be a very prevalent belief that the immediate juniors and not the tarwad are those entitled to the self-acquisitions and that not one of the decisions, including that of the Full Bench in *Govindan Nair* v. *Sankaran Nair*[2], is based upon usage but, on the other hand, the majority of the Judges acted on the maxim '*stare decisis*.'

In these circumstances we cannot take it that any 'Marumakkathayam usage' would have influenced the family law of the Nambudris in this respect. Nor have we been referred to any doctrine of ancient Hindu Law which denied to the son the right of succession to the separate property of his father, which may have served as a basis for the existence, if any, of a different rule of law among the Nambudris.

Under the old Hindu law, when self-acquisition was not recognised, no question could arise as to succession. When separate or self-acquisition was recognised, the law of succession followed the nature of the property. The foundation of the right to take by surviorship is common interest and common possession during the lifetime of the deceased. It is possible there may have been a stage in the growth of Hindu Law when a man who acquired any property had only the use of it, in which case his undivided family may have taken it on his death. But when after his complete dominion (with right of alienation) over self-acquisition was recognised, it is difficult to conceive a different line of descent for it from property that may have been obtained by partition which would undoubtedly be made to descend to natural heirs to the exclusion of those from whom he may have divided. The foundation of common interest in the property failing survivorship goes with it and the nature of the property determines the rule of succession. A Nambudri, like any other Hindu, has the right to alienate his self-acquisition in his lifetime without regard to any necessity or to the wishes of the other members of his family. He may devise it to strangers.

1. (1880) I. L. R. 3 M. 212. 2. (1909) I. L. R. 32 M. 353.

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Sankaran Nair J.

If the deceased had been a divided member, there is no doubt his son would have succeeded to the property obtained on partition and, in my opinion, the self-acquisition will follow the same course of descent. The 4th defendant is, therefore, entitled to the house and utensils and not the 1st defendant. The decree against the 1st defendant as representative is therefore reversed, but in the circumstances without costs. The suit was dismissed against the 4th defendant and there is no appeal.

Krishnaswami Aiyar J.—I agree in the judgment of Mr. Justice Sankaran Nair. As regards the pepper vines we must treat them as the property of the Illom. They were grown by the deceased Parameswaran Nambudri on Illom property. They cannot be held to be his self-acquisitions. The 1st defendant, as the Karnavan, is not liable for the debts contracted by Parameswaran so far as this property is concerned. No question has been raised in second appeal that the house and vessels were not the self-acquisitions of Parameswaran. The house is in the occupation of defendants Nos. 2 to 4, the mother, widow and son of Parameswaran, and the vessels too are in their possession. No decree can be given in this case against the 1st defendant on the ground that he is in possession of Parameswaran's property. But it is contended for the respondent that the Illom succeeds to the self-acquisition of every member and that the 1st defendant, as Karnavan, is properly liable for Parameswaran's debts. This question has been left undetermined by the District Judge. In *Chemmantha Attekunnath Lakshmi Anuma* v *Palakuzhu Thuppan Nambudri*[1] the question was left open whether under the customary law governing the Nambudris of Malabar the self-acquisitions of a Nambudri pass at his death to the immediate heirs of the acquirer or to the Illom. The observation in *Vasudevan* v. *The Secretary of State for India*[2] that self-acquired property merges, on the death of the person acquiring it, with family property, as is the case among Nairs, is not a binding decision. There is no course of decisions, as is the case amongst Marumkkathayam families, that the self-acquisitions of a member of a Nambudri Illom lapse to the Illom. The recent decision of the majority of the Full

1. (1902) I. L. R. 25 M. 662. 2. (1888) I. L. R. 11 M. 157.

Vishnu Nambudri v. Akkamma.

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Bench in *Govindan Nair* v. *Sankaram Nair* [1], which is solely rested on the current of judical authority as regards the descent of the self-acquisition of a Marumakkathayam Hindu, does not, therefore, apply to the case of Nambudris. Unfettered by authority there can be no question as to what is the rule of law we should apply to the descent of a Nambudri's self-acquisition. It is capable of gift *inter vivos*. It can be willed away at the pleasure of the acquirer. Unless the notion of heritable rights in the son, widow and daughter is foreign to the Nambudri, we are bound to apply the ordinary Hindu law of succession to the Nambudris' self-acquisitions. If we go back to the archaic Hindu law and repudiate the idea of self-acquisition itself, then, of course, the property acquired must lapse to the tarwad. But in that case even in the acquirer's life time he would have no right over it. But this being recognized even to the extent of validating a posthumous disposition by will, I do not see how we are entitled to refuse succession to the natural heirs of the acquirer. If an Illom became divided into individual units with the consent of all, each individual will pass his separate property to his own heirs and not to his divided brethren in a gronp. This was the analogy accepted by the Privy Council in the Shivagunga case (*Katama Nachiar* v. *The Rajah of Shivagunga* [2]) for the succession of self-acquisitions. The same holds good in the case of the self-acquisition of a Nambudri. The Numbudri is governed by the Smritis. He is even more orthodox than the Brahmin of the rest of the country. He owes allegiance to the Vedas, the Smritis and the Puranas. Except in so far as recognized custom has made any inroad into the law of the Smritis, he is governed by that law. The 4th defendant, as the son of Parameswaran, is entitled to the house and utensils. No decree has been passed against him and there is no appeal by the plaintiff to make him liable. We must, therefore, allow the appeal by the 1st defendant and dismiss the plaintiff's suit, but in the circumstances without costs.

1. (1909) I. L. R. 32 M. 351. 2. (1863) 9 M. I. A. 953.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller.

Bogra .. .. *Accused in Calendar No.* 80 *of* 1909 *on the file of the Sub-Magistrate, Mangalore, in Cr. A. No.* 90 *of* 1909 *on the file of the Sessions Judge of South Canara.*

Penal Code, S. 193—*Deposition not taken in accordance with law—Cr. P. Code, S.* 360. Bogra *In re.*

A conviction for perjury in respect of statements made in a deposition not read out in the presence of the vakil or the parties as required by law, when the deposition has been signed by the party as having been made by him, is not bad in law.

Petitioner not represented.

The Public Prosecutor C. F. Napier Contra.

Upon perusing the record submitted in accordance with the proceedings of this Court dated 21st January 1910 and proceedings before the Court of Session and upon hearing the arguments of the Public Prosecutor on behalf of the Crown the Court made the following

ORDER :—It was held by *Collins* C. J. and *Parker* J. in Criminal Revision Case No. 453 of 1894 (II, Weir's Criminal Rulings, 435) that procedure identical with that adopted by the Sessions Judge in the present case is materially irregular. The deposition taken in the Sessions Court was therefore irregularly taken and it may be that a conviction based upon such evidence could not be sustained. But in the present case the person concerned is the witness who made the deposition, and not the accused against whom it was made, and it has been read over to the witness, admitted to be correct and signed. It is very difficult, I think, to see any good reason why this admission of the witness should not be taken to be a proof of the correctness of the document. There is no doubt direct authority in this Court for the view that a deposition not read over in the hearing of the Judge and the Vakils (in a civil case) is not a deposition at all and cannot be used as evidence for any purpose—*Kamatchinathan Chetty* v. *Emperor*[1]—but that decision seems to be in part based on the reasoning that the presence of the Judge and Vakils at the reading is required for the protection of the witness. I very respectfully differ from that, if that

*Cr. R. C. No. 29 of 1910, Taken up No. 2 of 1910. 31st March 1910.

1. (1904) I. L. R. 28 M. 308.

Bogra *In re.*

is what was meant by the learned Judge. The presence of the Judge and the Vakils or the accused is required to make it sure that the deposition is correctly recorded and the accused or the Crown or the defendant or plaintiff is not prejudiced by any mistake in the recorded evidence. But when the deposition has been read over to the witness, and he has admitted it to be correct, there seems to be no good reason why that admission should not, so far as he is concerned, be regarded as a proof of its correctness. I cannot see why a deposition regularly recorded is necessarily to be treated as a nullity for all purposes even as against the man who made it and who has admitted that it represented what he said. It, of course, may be open to him to prove that the record was incorrectly made, but that is not suggested in the present case. I am not, holding this view, therefore prepared to hold that the conviction is illegal.

The accused has not himself applied for the revision of the Sessions Judge's decision and I do not think it is necessary to do more than point out that the deposition was undoubtedly irregularly recorded, and that the provisions of the Code and the law as laid down in this Court must be followed in the recording of the evidence by the Courts of this Presidency.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Adhiragi Chetty .. .. Appellant* (*Plaintiff*)

v.

Billa Tyampu .. .. Respondent (*Defendant*).

Adhiragi Chetty *v.* Billa Tyampu.

Landlord and Tenant—Relief against forfeiture when period of grace allowed.

Courts will not relieve against forfeiture for non-payment of rent after the period of grace allowed in the lease.

Second appeal from the decree of the District Court of South Canara in A. S. No. 370 of 1906 presented against the decree of the Court of the District Munsif of Karkal in O. S. No. 180 of 1906.

This was a suit for possession as on a forfeiture for non-payment of rent. The lease provided for payment within the end

* S. A. 356 of 1908. 31st March 1910.

Adhiragi Chetty v. Billa Tyampu.

of May next year ; in default before the end of May the following year with interest ; and in default then the property should be surrendered. Defendant pleaded that he had made payment to the Government on behalf of the plaintiff for arrears of *tirva*; that he had tendered the balance by money order, and deposited the admitted balance in Court. The District Munsif upheld the payment only in part, the other being in respect of the plaintiff's mother's patta; found against the tender by money order, and, on the ground that there was no tender of the full amount with the written statement, decreed the plaintiff's claim in full. On appeal the District Judge found the tender by money order as true, and on the ground that the defendant had made an honest attempt to pay up his rent, relieved the forfeiture. Plaintiff appealed.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

B. Sitarama Rao contended that there being a period of grace allowed in the document, the Court could not relieve against the forfeiture—*Narayana Naikan* v. *Vasudeva Bhatt*[1]; *Narayana Kamti* v. *Handu Shetty.*[2] Tender after the forfeiture is incurred is useless.

K. Y. Adiga contended that the jurisdiction of the Court is not excluded by the mere fact that a period of grace is allowed and that the two cases cited do not lay down any hard and fast rule. He also contended that the clause of forfeiture being contained only in a subsequent deed styling itself a contract cannot be read as a part of the lease but only an independent covenant.

The Court delivered the following

JUDGMENT :—Exhibit *B* modifies the terms of the lease Exhibit *A*. It provides that on default of payment by the due date the rent in arrears shall be paid with interest with the next year's rent. If default is made even then, the property shall be surrendered to the lessor. Following the decisions in *Naraina Naikan* v. *Vasudeva Bhath*[1] and *Narayana Kamti* v. *Handu Shetty*[2] the defendant is not entitled to be relieved

1. (1903) I. L. R. 28 M. 389. 2. (1901) 15 M. L. J. 210.

Adhiragi Chetty v. Billa Tyampu.

against the forfeiture. It is, moreover, found that the tender in the suit was not of the whole amount due.

We must reverse the decree of the District Judge and restore that of the Munsif with costs in this and the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

Thattoli Kothilan Aliyamma .. Appellant* (*2nd Defendant*)

v.

C. K. Kunhammed & another .. Respondent (*Plaintiff* & *1st defendant*).

Aliyamma v. Kunhammed.

Mahomedan Law—Minor—Agreement by guardian not to divide spes successionis.

Obiter:—Under the Mahomedan Law, to bind the minor by his guardian's consent, urgent necessity or clear benefit must be shown.

An agreement by the guardian not to divide a *spes successionis* is not within the rule and therefore not binding on the minors.

Second appeal from the decree of the District Court of Malabar in A. S. No. 403 of 1907 presented against the decree of the Court of the District Munsif of Tellicherry in O. S. No. 22 of 1906.

J. L. Rosario for appellant.

T. R. Ramachandra Aiyar for respondent.

J. L. Rosario, for appellant, contended on the construction of the document, that the document was not a deed of gift but only a deed conferring management; that no terms of disposition were there; that even supposing there was no agreement not to partition, the minor's consent was no good; anyhow the arrangement was not beneficial for the minors and therefore not within the competence of the guardian to consent, supposing that the guardian consented. He cited *Ramalinga Khanapure* v. *Virupakshi Khanapure*[1], *Sri Mohan Thakur* v. *Macgregor*[2], *Krishnendra Nath Sarkar* v. *Debendra Nath Sarkar*[3] to shew that it was an agreement with reference to *spes successionis* and as such also bad.

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*S. A. 50 of 1909. 10th August 1910.

1. (1883) I. L. R. 7 B. 538. 2. (1901) I. L. R. 28 C. 769.

3. (1908) 12 C. W. N. 793.

T. R. Ramachandra Aiyar, for respondent, contended that it was a gift; the arrangement being the basis of the gift is binding; any way it is a family arrangement like that in *Krishnendra Nath Sarkar* v. *Debendra Nath Sarkar*[1] and could not be disturbed.

J. L. Rosario, in reply, argued that the case on which *Krishnendra Nath Sarkar* v. *Debendra Nath Sarkar*[1] relies is a case before the *Tagore case*[2] and therefore cannot be accepted without question.

The Court delivered the following

JUDGMENT:—The 1st defendant had a kanom dated the 1st June 1890. Poker, father of the plaintiff and 2nd defendant had an equity of redemption. In 1903 Poker executed a document called a deed of settlement. It was also signed by his children, including the plaintiff and the 2nd defendant. Some of his children being minors, Poker signed the documents for them. One of the questions in the case is as to the effect of this document. The 2nd defendant has redeemed the kanom. The plaintiff claims possession from the 2nd defendant on payment of the amount due, Poker being dead. The 2nd defendant contends that the plaintiff is only entitled to sue for his share. The decision rests on the true construction of Exhibit *C*, the deed of settlement. Paragraph No. 2 of the document declares that Poker's children are his heirs under the Mahomedan Law and entitled to succeed on his death. Paragraph No. 4 transfers to the present plaintiff all rights of management and control overs Poker's properties. Paragraph No. 5 provides that the management shall last during the lifetime of the plaintiff and enumerates various powers of management. Paragraph No. 6 says that though his children will be entitled to divide the properties according to Mahomedan Law after Poker's death, no partition shall be made during the plaintiff's lifetime.

The property in suit, though apparently included in the schedule of properties dealt with by the deed of settlement, was then outstanding on kanom. It is clear to us that what was transferred to the plaintiff was the mere right to management with certain powers of dealing with the property. No estate was created in the plaintiff's favour, either absolute or for life, though

1. (1908) 12 C. W. N. 793. 2. (1872) 9. B. L. R. 37

liyamma v. Kunhammed.

authority was given to defray reasonable expenses. The plaintiff and the other children were simply to inherit the property on Poker's death. There are no words of disposition to the children of any interest in the property. On Poker's death, therefore, all the children, including the 2nd defendant, became entitled to their several interests under the Mahomedan Law. The 2nd defendant was entitled, by virtue of her interest in the equity of redemption, to redeem the kanom. On redemption she was entitled to hold the property subject to the plaintiff's right to a partition of his share. But it is argued for the respondent that the plaintiff is entitled to possession by virtue of the right of management acquired under the deed of settlement which was assented to by the 2nd defendant and the other children. It is argued that the provision as to the plaintiff's management and against partition during the plaintiff's lifetime to which the 2nd defendant gave her consent is binding upon her—see *Sri Mohan Thakur* v. *Macgregor*[1] and *Krishnendra Nath Sirkar* v. *Debendra Nath Sarkar*[2]; also MAYNE'S *Hindu Law*, p. 657—though it is difficult to see what consideration Poker's children, other than the plaintiff, received for agreeing not to divide. The decision in *Ramalinga Khanapure* v. *Virupakshi Khanapure*[3], which declared an agreement never to divide invalid, does not affect the present case. The preponderance of American authority summarised in FREEMAN on *Co-tenancy*, S. 442, appears to be in favor of the binding character of agreements not to divide as regards the parties to the agreement. For a similar rule under the Civil Law see DOMAT, Article 1498. But the agreement in this case was entered into in respect of a *spes successionis*. Section 6 of the Transfer of Property Act has, it is true, no application, because the agreement related merely to non-division and the right of management.

But we are not aware of any authority for holding that an agreement not to divide a *spes successionis* is binding upon the parties even though the period of non-division is limited to one life. The agreement certainly cannot bind the three minors on whose behalf Poker himself, as guardian, gave the assent. The powers of the guardian under the Mahomedan

1. (1901) I. L. R. 28 C. 769. 2. (1908) 12 C. W. N. 793.
3. (1883) I. L. R. 7 B. 538.

Law in respect of immoveable property are very restricted : see AMIR ALI, Vol. II Edn., p. 479, and Shama Charn Sarkar ; Part I, p. 484. Urgent necessity or clear benefit to the ward must be shown: see *Mussammat Bukshan* v. *Mussammat Kooeri*[1]; *Mussammat Syed* v. *Syud Velayat Alikhan*[2]; *Bhutnath Dey* v. *Ahmed Hosain*,[3] and *Hurbhai* v. *Hiraji Byramji Shanja*[4]. The decision of the Privy Council in *Kali Dutt Jha* v. *Abdul Ali*[5] recognises the rule of clear benefit to the ward as a necessary condition of the validity of the alienation of a ward's immoveable property. It is difficult to pretend, so far as minors are concerned, that an agreement by the guardian surrendering in anticipation to management of a *spes successionis* is within the rule as to the clear benefit to the ward. The agreement being invalid as regards some of the parties to it, it is difficult to uphold it as to others, vitiated already, as it is by its dealing with a *spes successionis*. However this may be, we are clear that the agreement as to management cannot affect the kanom interest which was outstanding. The 2nd defendant was entitled to acquire it and the plaintiff's only right is to have a partition of his share on payment of his proportion of the mortgage money. The present suit is not one for partition and the other sharers who would be necessary parties to such a suit have not been impleaded. We would allow the appeal and dismiss the suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

K. R. Nilakandan Nambudripad and another .. Appellants* (*Plaintiffs*)

v.

P. K. Sankaran Nambiar and others ... Respondents (*Defendants*).

Lunacy—Effect of vested rights—Uralan.

Lunacy does not divest the estate already vested or the right of management, though it may be a ground for the removal of a lunatic from the

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1. (1869) 3 B. L. R. A. C. 423.
2. (1872) 17 W. R. 239.
3. (1885) I. L. R. 11 C. 417.
4. (1895) I. L. R. 20 B. 116.
5. (1888) I. L. R. 16 C. 627.

*S. A. 142 of 1908. 16th March 1910.

office of trustee which is hereditary. Consequently, an *Uralan*, if a lunatic, does not *ipso facto* cease to be an Uralan so as to allow the next in succession to step in. [*Vidyapurna* v. *Vidyanidhi* referred to.]

Second appeal from the decree of the District Court of South Malabar in A. S. No. 153 of 1907, presented against the decree of the Court of the District Munsif of Ottapalam in O. S. No. 431 of 1905.

T. R. Ramachandra Aiyar for appellant.

C. V. Ananthakrishna Aiyar for respondents.

Suit to redeem a *kanom* renewed by three out of four Uralans. The 4th was alleged to have been a lunatic at the time of the renewal and he was not consulted.

T. R. Ramachandra Aiyar.—The lunatic ought to have been consulted if he, notwithstanding his lunacy, continued to be an Uralan. But if not, the next senior *Anandravan* should have been consulted. The renewal having been granted without any such consultation is invalid. The renewal was in favour of one of the Uralans themselves—*Vidyapurna* v. *Vidyanidhi*[1] and *Kumaran* v. *Kunjan.*[2] Another point is that the renewal deed purports to have been executed by three but signed only by two. It is, therefore, inchoate and inoperative.

C. V. Ananthakrishna Aiyar relied on *Vidyapurna* v. *Vidyanidhi*[1] and POPE on *Lunacy*, 2nd Edn, pp. 370 and 371.

The Court delivered the following

JUDGMENT:—The suit is by two Uralers to redeem a *kanom.* The 1st defendant pleads a renewal by the Uralers. The plaintiffs impeach the validity of the renewal on the ground that the 1st plaintiff was not consulted. But the 1st plaintiff was not an Uralan at the time of the renewal. His *karnavan* was the Uralan. But the plaintiffs contend that he was a lunatic and that the 1st plaintiff was by operation of law the Uralan in his place. The observations of *Subrahmanya Aiyar* and *Bashyam Iyengar* JJ. in *Vidhyapurna Tirthaswami* v. *Vidhyanidhi Thirthaswami*[1] are against this view. Lunacy does not divest the estate already vested or the right of management, though it may be a ground for removal of the lunatic from the office of trustee which is hereditary.

1. (1904) I.L.R. 27 M. 435. 2. (1889) I.L.R. 12 M. 307.

The 1st plaintiff not being a trustee at the time of the renewal, the renewal cannot be deemed to be invalid because he was not consulted. Nilakandan v. Sankaran.

It is now urged for the first time in second appeal that the 2nd plaintiff has not signed the renewal deed though it purports to be in his name also, and that it is bad on that account. The document purports to be in the name of the 2nd plaintiff as well though it is signed only by the 13th defendant. It may be the latter had authority to sign for the 2nd plaintiff. We cannot allow the question of the absence of the 2nd plaintiff's signature to be raised now when the 1st defendant may be in a position to explain it as due to the 13th defendant having been clothed with due authority to act for all.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Thattan Konther's son Kunhan of Thekkumangalam Desam, Lakkidi Amshom, Walluvanad Taluk .. Appellant*
(11th Defendant)

v.

Mangalath Manakal Narayanan Nambudripad's son Moorthi *alias* Ashtamoorthi Nambudripad and others. Respondents
(*Plff. & Defts.* 5 to 10).

Mortgage—Redemption by one of several co-mortgagors—Right of mortgagee to question right of redemption—Trusts, public and charitable—Majority and minority—Consultation necessary—Estoppel by representation—Renewal of kanom. Trustees—Suit by one of several, for redemption—Non-joinder as co-plaintiffs—Decree, form of. Kunhan v. Moorthi.

An assignee of the mortgage interest is entitled to question the right of one of the co-mortgagors to redemption whether or not the remaining co-mortgagors acquiesce in the claim of the plaintiff to redeem.

In the case of public and charitable trusts, all the trustees should have an opportunity of stating their opinion; and any act (*e.g.*, renewal of a *kanom*) done by the majority without reference to the minority is not valid.

A provision that the managing *Uralars* should grant renewals "with the greatest possible number of *Uralars* receiving the renewal fees" does not mean that the majority can effect renewals without any reference to the minority or without inviting its co-operation.

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* S. A. 1693 of 1908. 20th July 1910.

Kunhan v. Moorthi.

The rule of estoppel by representation in holding out certain persons as clothed with authority has no application where the majority has only a limited authority within the limits of which a stranger dealing with them has to find the power to enter into the transaction.

A renewal of a *kanom* was effected by a majority of *Uralars* without consulting the minority. *Held* that the renewal was invalid and that the minority was not estopped from disputing the validity of the *kanom* as regards the kanomdar who was a stranger.

One of several trustees may sue for redemption without consulting the others or making them co-plaintiffs, provided all are impleaded in the suit. The proper decree in such cases is to order the trust property to be restored to all the trustees for the benefit of the *cesti que trust.*

Second appeal from the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 748 of 1907 presented against the decree of the Court of the District Munsif of Ottapalam in O. S. No. 465 of 1906.

P. R. Sundara Aiyar, A. Nilakanta Aiyar and *K. Govinda Marar* for appellant.

T. R. Ramachandra Aiyar and *V. Ryru Nambiar* for respondent.

The Court delivered the following

JUDGMENT:—This is a suit for redemption. The plaintiff is one of the Uralars of the Killikurishi Devaswom. The kanom sought to be redeemed is of the year 1884. It was granted to the family of the defendants Nos. 1 to 3. Defendants Nos. 5 to 10 are impleaded as the remaining Uralars of the temple. The defendants set up a renewal in 1905 to which the plaintiff was no party. The 11th defendant is the assignee of the rights of the kanomdars. The Courts below have held the renewal to be invalid and given a decree to the plaintiff for redemption. The 11th defendant has preferred the second appeal.

A preliminary objection was taken that the 11th defendant had no right to prefer the second appeal in as much as the plaintiff's co-uralars did not contest the decree of the lower appellate Court. We see no force in this objection. The 11th defendant as assignee of the mortgage interest is entitled to question the right of one of the co-mortgagors to redemption, whether or not the remaining co-mortgagors acquiesce in the claim of the plaintiff.

It is argued in second appeal that the plaintiff was a consenting party to the renewal and that his name appears in Exhibit XXIV as one of the persons present when the resolutions therein set out were adopted. It appears there that " it

is resolved that the Uralan that manages the affairs of the respective years should grant renewals with the greatest possible number of Uralars, receiving the renewal fees, signing fees at the rates now settled from tenants whose term of lease has expired." The actual renewal now impeached is Exhibit I. The plaintiff was no party to its execution, nor was he consulted about it. We do not understand Exhibit XX to dispense with the necessity for all the Uralars being consulted before the execution of the renewal. "The greatest possible number of Uralars receiving the renewal fees" does not mean that it is left to the option of a majority to set at nought a minority and to carry on the business of the Devaswom in the matter of renewals without any reference to that minority or without inviting its co-operation. We must, therefore, hold that the plaintiff, not having been consulted in respect of the renewal in question, is not precluded from impeaching it.

It is next contended that the majority of the trustees of the Devaswom were parties to the renewals and that in the case of a charitable trust the consent of the majority is sufficient to validate the transaction. "In the due administration of all trusts of a private nature the vote or act of the majority of the trustees cannot, in the absence of an express or implied power, bind dissenting minority"—see *Luke* v. *South Kensington Hotel. Co* [1]. But it has long been held, owing probably to the validity of perpetuities in charities and the consequent perpetual succession of trustees which would produce a dead-lock in the administration if unanimity were insisted on, that a majority of trustees has powers to bind the minority. See TUDOR'S *Charitable Trusts*, p.259. It does not appear to us to follow, from the exception of the validity of the acts of the majority in public and charitable trusts that they may transact the affairs of the trust without any reference to the minority. On the other hand it seems to us that the very principle of recognising the validity of the acts of the majority involves the necessity of the decision of the majority being arrived at after mutual discussion among all the members. A minority before mutual consultation may be converted into a majority after it. Unanimity on all occasions may be impossible. A majority after consultation and discussion is the nearest

1. (1879) 11 Ch. D. 121.

Kunhan v. Moorthi.

approach to it. Reliance was placed on *The Attorney-General* v. *Shearman* [1] in support of the view that a majority is sufficient even though the minority had no opportunity to express their views. In this case there were 11 trustees. There was an original lease by them to one last. There was a renewed lease to the original lessee and another by six out of the eleven trustees, the rest having refused to join. When the second lease was impeached it was held to be valid. This case is no authority for the position that a majority of the trustees can act in respect of a public or charitable trust without giving an opportunity to the minority to state their dissent. In *Teramath* v. *Lakshmi* [2] it was held that the decision of the majority was binding upon a dissentient minority where the majority of the Uralars of a Devaswom agreed to renew a *kanom* on terms beneficial to the Devaswom after the question of the renewal had been fairly considered by all the Uralars. It was pointed out that in such a case each had the opportunity to let his views be known before a decision is passed. The High Court remitted an issue for trial whether the renewal was the result of consultation by all the Uralars though a majority had actually concurred in signing the deed. S. 16 of the Charitable Trusts Act 1860 (23 & 24 Victoria, Chapter 136) provided: " A majority of two-thirds of the trustees of any charity assembled at a meeting of their body duly constituted and having power to determine, etc., shall also have a legal power on behalf of themselves and their co-trustees, &c., to do, enter into, and execute all such acts, deeds, contracts and assurances as shall be requisite for carrying any such sale, exchange, partition, mortgage, lease or disposition into legal effect, and all such acts, deeds, contracts or assurances shall have the same legal effect as if the same were respectively done, entered into or executed by all the acting trustees for the time being, &c., &c."

This section was repealed by S. 17 of the Charitable Trusts Act 1869 (32 & 33, Victoria, Chapter 110). S. 12 of this later Act repealed the earlier provision thus: " Where the trustees or persons acting in the administration of any charity have power to determine on any sale, exchange, partition, mortgage, lease or other disposition of any property of the charity, a majority of those trustees or persons who are present at a meeting of their body

1. 1839) 48 E. R. 1119. 2. (1883) I. L. R. 6 M. 270.

duly constituted and vote on the question shall have and be deemed to have always had full power to execute and do all such assurances, &c., for carrying any such sale, &c., into effect and all such assurances, &c., shall have the same effect as if they were respectively executed and done by all such trustees or persons, &c." See 4 HALSBURY'S *Laws of England*, S. 416. This, no doubt, is a statutory provision. But the same rule obtained as regards mutual consultation and opportunity for the statement of each person's views before these statutes. In *Wilkinson* v. *Malin* [1] a school-master was appointed by a majority of the trustees assembled for the purpose. He was dismissed by five out of the trustees without a meeting and there was no opportunity for the remaining trustees to participate in the business. Dealing with the dismissal *Lord Lyndhurst*, C.B., who delivered the judgment of the Court of Exchequer, observed as follows:—" The next question that arises for consideration arises on the ninth and last issue, being whether the master was duly and properly dismissed. Now the dismissal was in this form: there was no public meeting nor any declaration of a majority assembled at a public meeting that the school-master should cease to act in that situation: but five out of the trustees not assembled in that formal manner gave notice that the school-master should, within a certain time, retire from his office. In the first place, at the time when the notice was given, there were ten trustees so that the persons who gave notice did not even constitute a majority of the whole body. In the next place, even if they did constitute a majority of the whole body it is the whole body that is to dismiss and not a majority of it. So that if there is a meeting and a majority are for dismissal, then the declaration of the majority is not merely the declaration of the majority but of the whole body; which whole body does in fact dismiss. Therefore, in a case of this description, where there was no meeting and where five individuals gave their opinion, or said, that the dismissal should take place in a short time or that the party should cease to act as school-master, we are of opinion that that is not a valid dismissal within the meaning of this trust." Without deciding that in every case of a transaction entered into by the majority of the trustees of a public and charitable trust there should have

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1. (1832) 2 Trywhit 544.

Kunhan *v.* Moorthi.

been a meeting of all to validate it, we may safely hold that all the trustees should have had an opportunity of stating their opinion. As the plaintiff in the present case was never consulted about the particular renewal, we must hold that it was invalid.

It was urged that as regards the mortgagee he had nothing to do with the meeting or consultation amongst the trustees but that he was justified in accepting the renewal granted by the majority as they must be deemed to have had authority to represent the whole body. The argument was rested on the principle of estoppel. *The Attorney-General* v. *Shearman*[1] and LINDLEY on *Companies*, p. 128, were relied on. As regards the case cited, we have already pointed out that it was not a case of a majority of the trustees having acted without reference to the minority. In holding that the acts of the majority, in the circumstances of that case, are binding, the Master of the Rolls further pointed out that the lessee had no notice from the dissenting minority; that they objected to the lease, and that there was no pretence of fraud or concealment on the part of the majority. These observations do not carry the matter as far as the appellant wants. They do not amount to saying that so far as the validity of the transaction as regards the party dealing with the majority of the trustees is concerned it is established by the majority of the trustees concurring in it. As regards the rule laid down in LINDLEY on *Companies* that there is no necessity on the part of persons dealing with Companies to see that *de facto* directors are properly appointed nor to see that the directors exercise the powers they possess in the precise manner prescribed in the regulations of the Company, it is to be observed that the principle underlying it is different from what we have to apply to a case where a majority has no power to act for the whole body unless the whole body had been consulted about it. If *prima facie* the majority had power to act and it is a mere informality or a piece of irregularity in their not having consulted about the transaction the position of the lessee or mortgagee would be different. This is not a case where the minority has permitted the majority to act for them subject to certain conditions assuming it would be competent to trustees to confer such a power

1. (1839) 48 E. R. 1119.

upon their fellows. The rûle of estoppel, by holding out certain persons as clothed with authorfty, has no application where the majority has only a limited authority within the limits of which a stranger dealing with it has to find the power to enter into the transaction. Another contention of a formal nature was raised. It was said that the 6th defendant had surrendered his right in favour of his son Sankaran and likewise the 10th in favour of his nephew Parameswaran, and that they were Uralars of the temple and should have been impleaded. This contention has been negatived by the Courts below. It is unnecessary to discuss it as the 11th defendant who is the only appellant before us did not raise any such plea in his written statement.

The appellant has then an alternative argument that if the 6th and 10th defendants are the Uralars they have not been consulted by the plaintiffs as regards the institution of the suit. It is urged with much force that if a majority of trustees cannot enter into any transaction without consulting the minority the institution of a suit by a single trustee without taking the opinion of the other trustees is bad and the suit is on this ground liable to be dismissed. There has been considerable conflict of opinion on the question of joinder of co-trustees in this Court. It was held in *Parameshwaran* v. *Shangaran*,[1] *Paramathan Somayajipad* v. *Shankara Menon*[2] and *Savitri Antarjanam* v. *Raman Nambudri*[3] that some of the trustees of a Devaswom cannot institute a suit on its behalf making the other trustees defendants without having asked them to join as plaintiffs. An exception was made in other cases where the other trustees perversely declined to co-operate and the suit was for the benefit of the institution. The last of these cases was doubted in *Mariyel Raman Nair* v. *Narayanan Nambudripad*[4] but it was unnecessary to decide the question of the necessity for previous request to join as co-plaintiffs as in that case the plaintiff impeached the renewal which the co-trustee defendant granted and it was impossible to get one to impeach his own deed. The question, however, was referred to a Full Bench in *Karattole Edamana* v. *Unnikanam*[5]. But as that was a suit for a redemption by one trustee it was held that

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1. (1891) I. L. R. 14 M. 489.
2. (1899) I. L. R. 23 M. 82.
3. (1900) I. L. R. 24 M. 296.
4. (1902) I. L. R. 26 M. 461.
5. (1903) I. L. R. 26 M. 649.

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S. 91 of the Transfer of Property Act enabled any person having an interest in the mortgage property to institute a suit for redemption and that one of several Uralars was a person having such interest and could therefore bring a suit for redemption. *Savitri Antarjanam* v. *Raman Nambudri*[1] was practically overruled. But the Court expressed no opinion about the correctness of the decisions in *Parameswaran* v. *Shangaran*[2] and *Paramathan Somayajipad* v. *Sankara Menon*[3] which were suits in ejectment. The present case being one for redemption would apparently fall within the scope of the rule in the Full Bench case. But it is pointed out by Mr. Sundara Aiyar that joint trustees have not a several interest in the property of the Devaswom or any personal interest in it and that S. 91 does not contemplate the interest of one of several co-trustees or entitle him to institute a suit for redemption. It may be, as pointed out by him, that the question of majority voting for redemption is different from that of the joinder of all as plaintiffs and that this view was not presented to the Court. It certainly does not appear to have been considered. But we cannot, on that account, whittle away the authority of that decision. However, apart from the authority of that case which is binding upon us, we are not satisfied that a suit by one Uralan in which co-uralars are impleaded as defendants for redemption from mortgagees or for recovery of devaswom property from trespassers is liable to be necessarily dismissed for the reason that the co-uralars were not joined as co-plaintiffs or even consulted before the institution of the suit. It has been held in case of joint owners or joint contractors that some of them may sue persons who infringe their rights impleading co-owners and co-contractors as party defendants and without consulting them before the institution of the suit. See *Periakaruppan* v. *Velayuthan Chetti*[4]; *Pyare Mohun Bose* v. *Kedar Nath Roy*[5] and *Biri Singh* v. *Nawal Singh*[6]. Does it make any difference that the joint owners are trustees? There is a distinction that their interest is one and indivisible, while in the other cases there is a separable beneficial interest. In cases where no remedial right accrues to the trustees until a majority

1. (1900) I. L. R. 24 M. 296.
2. (1891) I. L. R. 14 M. 489.
3. (1899) I. L. R. 23 M. 282.
4. (1906) I. L. R. 29 M. 302.
5. (1899) I. L. R. 26 C. 409.
6. (1898) I. L. R. 24 A. 226.

after a mutual consultation have signified their will, it cannot be competent to some of the trustees or even the majority to institute an action without such consultation. It may also be that if the decision in such a case of the majority is adverse the minority cannot institute an action as the remedial right has not come into existence. Take the case of a suit for the removal of an employee of a Devaswom by some of the trustees making them remainder defendants. Then the employee was liable to be removed by the vote of the majority. If no such majority had concurred in dismissing the employee from office a suit by some of them would be ineffectual and would be liable to be dismissed on the ground that the trustees who desired the removal had not acted. It may also be where the removal of such employee is in the interests of the Devaswom essential and the conduct of the majority of the trustees in upholding the misbehaving servant is open to exception, the minority is not without its remedy. But where the right to the relief claimed has accrued to the joint trustees, the institution of a suit by some only without their having consulted the remaining trustees, even where they have not perversely refused to join, cannot, it appears to us, be a sufficient ground for dismissing the suit. Although the interests of the co-trustees is joint and indivisible, it is fully represented where they are all on the record on the one side or the other. Whatever question of costs may arise, misjoinder is not fatal to the suit. In *Kokilasari Dasi* v. *Mohunt Rudranand Goswami*[1] while laying down the rule that all trustees should ordinarily be co-plaintiffs and that they must exercise the powers of their office in their joint capacity, the Court pointed out that it was unable to follow the Full Bench Ruling in *Pyari Mohan Bose* v. *Kedarnath Roy*[2] in the particular circumstances of the case by transferring the co-trustees to the rank of the plaintiffs as the original plaintiff set up sole right in himself. In *Luke* v. *South Kensington Hotel Company*[3] where there were three trustees of a private trust and the renewal mortgage in favor of two of them was impeached by the third in a suit to foreclose the mortgage the Master of the Rolls after disposing of the misjoinder as not made out in the circumstances of the case, proceeded to deal with an objection similar to that now raised in

1. (1907) 5 C. L. J. 527. 2. (1899) I. L. R. 26 C. 429.
3. (1879) 11 Ch. D. 121.

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the following words:—"There it is said that some of the mortgagees might not wish to foreclose and others might. We will deal with that case when it arises, as to whether one without the consent or against the wish of the other can foreclose. That is not the case here. The other two defendants do not oppose the foreclosure. They were not willing to be plaintiffs but they do not refuse to foreclose. If two out of three trustees decline to foreclose or to agree to any other remedy it might be a reason for removing them from being trustees; but that is not the case here, and we have not therefore to consider that case which may be dealt with when it arises." The Master of the Rolls did not think that the unwillingness of the trustee-defendants to foreclose would be ground for dismissing the plaintiff's suit for foreclosure. Lord Justice *James* added: "In the old Chancery Practice there was this difficulty, that the misjoinder of plaintiffs was fatal and that if you had any one person among the plaintiffs who had done anything which might have amounted in equity to a release of his rights the whole suit failed and there was no remedy for it and therefore as a general rule you selected, if you could, one person as plaintiff whom you knew to be free from any charge or imputation of misconduct and made all the others defendants. There never was any objection to that in practice. Now that is rendered unnecessary by the fact that the Courts may deal with misjoinder of plaintiffs according to the justice and equity of the case." In the present case the right to redeem has long accrued. The plaintiff, as one of the joint trustees, is right in enforcing the claim of the Devaswom to redeem. If defendants Nos. 5 to 10 are unwilling to join in the redemption there may arise a question as to how they are to be dealt with. We see no objection to one trustee suing for redemption without consulting the others or making them co-plaintiffs. But Mr. Sundara Aiyar urged that the decree should have been one for redemption in favour of the plaintiff and defendants Nos. 5 to 10. They were not represented before us. The proper course in such cases, as pointed out by the Master of the Rolls in the case already referred to, is to order the trust property to be restored to all for the benefit of the *cestui que trust*. But the trustee-defendants have not asked for it. The decrees of the Courts below are in plaintiff's favor on behalf of the Devaswom. There is no need to vary them. The second appeal is dismissed with costs. The time for redemption is extended to two months from this date.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

Kuppana Gavundan .. Appellant* (*Petitioner*)

v.

Kumara Gavundan & others .. Respondents.

C. P. C., O. 21, *rr.* 98, 95, 102, *S.* 146—*Applicability of r.* 98 *to purchaser from judgment-debtor after attachment "by the judgment-debtor."*

Kuppana Gavundan v. Kumara Gavundan.

Rule 98 of Order 21 has to be read along with Rule 95 of O. 21. O. 21, r. 98, is applicable to cases of obstruction by the purchaser from the judgment-debtor after attachment, he being the representative of the judgment-debtor within the meaning of S. 47, C.P.C.

Appeal from the order of the District Court of Madura in Interlocutory Application No. 408 of 1909 (O. S. No. 33 of 1899) on the file of the Subordinate Judge's Court of Madura (West).

Application under Order XXI, R. 98, to remove obstruction by the 1st respondent, purchaser after attachment by the plaintiff, a money decree-holder. The 7th defendant, (2nd respondent) was party to the suit but had been exonerated. The allegation of the applicant (decree-holder-purchaser) was that the 1st respondent was set on by the judgment-debtor and the 7th defendant to obstruct him although an application for possession on a previous obstruction by the 1st respondent had been granted. An appeal had been preferred against that order but had been dismissed on the ground that the 1st respondent came within S. 335 and therefore no appeal lay. The Judge dismissed the present application on the ground that the 1st respondent held on his own account.

S. Srinivasa Aiyangar for appellant.

B. Sitarama Rao for respondents.

B. Sitarama Rao, for respondents, took the preliminary objection that no appeal lay because it was an order passed under R.99. He relied upon *Jathevaedan Nambudri* v. *Kunchu Achen*[1] and contended that the definition of "judgment-debtor" in S. 2, Cl.(11), did not include a purchaser of the property though it

*A. A. O. No. 248 of 1907. 5th August, 1910.

1. (1906) I.L.R. 30 M. 72.

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might include a legal representative by force of the definition of the words ' legal representative.' He also contended that an attachment creates no interest under the rulings of the Judicial Committee in *Moti Lal* v. *Karrabuldin*[1] and of this Court in *Zamindar of Karvetnagaram* v. *Trustee of Tripati*[2] and that the ruling in *Paramanand Dos* v. *Mahabir Dossjee*[3] is no longer an authority for holding that an appeal would lie in cases like these. The explanation in *Jathavedan Nambudri* v. *Kunchu Achan*[4] of the cases in *Ramaswami* v. *Kameswaramma*[5] and *Vibudapriya* v. *Vidyanidhi*[6] is equally good in the present case. He cited also *Sankaravadiammal* v. *Kumarasamya*[7]. He also pointed out that rule 101 would have no justification but for the view contended for.

S. Srinivasa Aiyangar, for appellant, relied upon O. XXI, r. 95, and S. 146, C.P.C., to show that a purchaser after attachment would come within r. 98 and that he would not come within r. 99. The Court is bound to adjudicate the question between the parties and their representatives though under r. 103 there might be an option to proceed by suit.

B. Sitarama Rao, for respondent, contended that S. 146 is inapplicable to the case as there was no application or proceeding to be taken in this case under the terms of the section; that it was incompatible with the wording of the rules; that any how the Court having already held that the 1st respondent was a party coming within S. 335, the plaintiff is either estopped by contending to the contrary or is barred by *res judicata*. Any how the application being under rule 98, cl. (ii), to commit the party to prison, the Judge acted properly in dismissing the application under r. 99 and no appeal lay.

S. Srinivasa Aiyangar contended that on a point of law there could be no *res judicata*, no question of fact having been decided.

The Court delivered the following

JUDGMENT :—The petitioner who was the decree-holder purchased properties in execution of the decree and was obstruct-

1. (1897) I.L.R. 25 C. 179.
2. (1909) I.L.R. 32 M. at 441.
3. (1896) I.L.R. 20 M. 378.
4. (1906) I.L.R. 30 M. 72.
5. (1899) I.L.R. 23 M. 361.
6. (1898) I.L.R. 22 M. 161.
7. (1885) I.L.R. 8 M. 473.

ed by the respondents. He obtained an order for delivery and an appeal against it was dismissed.

Kuppana Gavundan v. Kumara Gavundan.

Being resisted by the respondents when attempting to take delivery he applies under Order XXI, rule 98, of the C.P.C. The District Judge has dismissed the application, holding that the said rule has no application. As regards the 7th defendant against whom no decree was passed and who was therefore not the judgment-debtor the order is right. But we are unable to uphold it as regards the 1st defendant and Kumara Gavundan who is alleged to have purchased the property subsequent to the attachment and while the same was pending. The purchaser of the attached property is the representative of the judgment-debtor within the meaning of S. 47 of the New Code of Civil Procedure corresponding to S. 244 of the old Code. See *Paramananda Das* v. *Mahabir Dossji*[1]; *Lalji Mal* v. *Nandkishore*[2]; *Gur Prasad* v. *Ram Lal*[3]; *Mathewson* v. *Gobardham Tribedi*[4]. Under rule 95 of Order XXI the Court is authorized to order delivery to a purchaser against a person "claiming under a title created by the judgment-debtor subsequently to the attachment of the property." The first respondent is such a person and any question between him and the decree-holder-purchaser would fall under S. 47. There is nothing in rule 98 which militates against this view. That rule has to be read along with rule 95. No inference can be drawn against the applicability of S. 47 from the omission in rule 98 of a person claiming title by purchase from the judgment-debtor after attachment. In fact rule 102 which recognizes the transferee from the judgment-debtor as his representative in execution of decrees for possession of immoveable properties, shows that a similar view must be taken of the purchaser of attached property. Rules 95 and 102 between them cover the cases of representatives of the judgment-debtor in cases of transfers after attachment under a money decree and transfers of property whose possession is decreed to the plaintiffs. The decision in *Jathevedan Nambudri* v. *Kunchu Achen*[5] has no application as the obstruction there was caused by a person who was not the judgment-debtor nor his representative. Assuming

1. (1896) I. L. R. 20 M. 378.
2. (1896) I. L. R. 19 A. 332.
3. (1898) I. L. R. 21 A. 20.
4. (1900) I. L. R. 28 C. 492.
5. (1906) I.L.R. 30 M. 72.

Kuppana Gavundan. v. Kumara Gavunda n.

that there is any doubt in the matter, on the language of rule 98 itself we should be quite prepared to hold that under S. 146 the Judge was bound to deal with the application under rule 98. The District Judge was, therefore, wrong in holding that he could not entertain the application. It follows that we must also overrule the objection that no appeal lies.

It is urged for the respondent that the case is concluded by a previous order of the District Judge in Appeal No. 147 of 1909 on the file of this Court which we have already referred to. There the Judge dismissed an appeal of the present respondent against the Subordinate Judge's order for delivery and the ground of his dismissal was that the appellant was a person claiming in his own right and not on behalf of the 1st defendant. This was erroneous and we cannot regard that error as concluding the present appeal. A decision in one proceeding that no appeal lay has not the force of *res judicata* so as to preclude an appeal in another proceeding.

We set aside the order of the District Judge except as regards the 7th defendant and remand the case for disposal according to law. Costs hitherto incurred will be provided for by the Court below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyer.

Syed Nooroodeen Saib & others .. Appellants*

v.

Syed Ibrahim Sahib & others .. Respondents.

Nooroodeen Sahib v. Ibrahim Sahib.

Limitation Act, Arts. 120, 144—*Suit for partition of immoveables and moveables.*

Art. 120 is not applicable to a suit by the heir of a deceased Mahomedan for the share of the deceased's estate where the subject matter consists of immoveables. The suit in so far as it relates to immoveables is governed by Art. 144 of the Limitation Act and the fact that the plaintiff has withheld the moveables for over six years and that consequently, his right to a share in the immoveables may be affected does not affect the matter. [*Mahomed Raisal Ali* v. *Hasin Banu*[1] and *Punchordas* v. *Parvati Bai*[2] referred to.]

Second appeal from the decree of the District Court of Madura in A. S. No. 687 of 1907, presented against the decree

* S. A. No. 1927 of 1908 25th April 1910.

1. (1893) I. L. R. 21 C. 157. 2. (1899) I. L. R. 23 B. 725 (P. C.)

of the Subordinate Judge's Court of Madura (West) in O. S. No. 32 of 1905. Nooroodee Sahib. *v.* Ibrahim Sahib

T. Rangachariar for appellants.

K. Srinivasa Aiyangar for respondents.

T. Rangachariar :—A suit for the partition of the estate of a deceased man consisting of moveables and immoveabes by one of the co-heirs is governed by Art. 120. If it is to be held that Art. 120 governs suits for the recovery of moveables and Art. 144 of immoveables, it might lead to great anomalies. How are the rights of the parties to be adjusted when the whole ought to be brought into the hotch-pot under the law and yet cannot be brought under the Limitation Law. The case in *Mahomed Raisat Ali* v. *Hasin Banu*[1] lends supports to the view that Art. 120 applies to such cases.

K. Srinivasa Aiyangar cited *Runchordas* v. *Parvati Bai.*[2]

The Court delivered the following

JUDGMENT :—The suit is by a Muhammadan for partition of half share of properties both movable and immovable on his wife's death. The defendants, among whom are the other sharers, do not set up adverse possession. Even assuming that possession became adverse at some time within the last 12 years, there is no reason to suppose that it was adverse before the 27th November 1893, while defendants Nos. 27 to 31 were impleaded on the 27th November 1905. We must hold that the suit as regards immovables is not time-barred. In this view, it is unnecessary to express any opinion on the other points argued. But we think that the District Judge was right in holding that the plaintiff was entitled to the deduction of the time spent in prosecuting the suit before the Munsif. The question was one of market-value and the plaintiff paid substantial court-fee. We are not prepared to say that the Judge was wrong in holding that the plaintiff's valuation was *bona fide.*

Mr. Rangachariar raised an ingenious contention, on the authority of *Mahomed Riasat Ali* v. *Hasin Banu*[1], that the Article applicable was 120 of the Limitation Act. The Privy Council applied that Article as regards a claim for movables by the heir of a deceased person. In *Runchordas* v. *Parvati Bai*[2]

1. (1893) I.L.R. 21 C. 157 (P.C.)   2. (1899) I.L.R. 23 B. 725 (P. C.)

Goroodeen Sahib. v. Ibrahim Sahib.

the Judicial Committee decided that a Hindu reversioner suing for the property of a deceased Hindu was entitled to come within 6 years as regards movables and 12 years as regards immovables. Mr. Rangachariar, however, argues that this is a suit for partition and that a share can only be. allowed after taking into account both movables and immovables. That is no doubt so, and if the plaintiff withholds movables after 6 years from the date of the death of the intestate, his share of the immovables may be affected. But this has nothing to do with limitation as regards the claims to immovables. Article 144 of the Limitation Act must be applied to the suit as regards immovable property. There is no foundation for the contention that the claim for immovables is time-barred.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Mangalasami *alias* Muthuvijia Raghunatha Thevar .. Appellant* (*Plaintiff*)

v.

Subbiah Pillay & others .. Respondents (*Defendants*).

Mangalasami v. Subbiah Pillay.

Registration Act, S. 17—"Immoveable property"—Future rent—Lease of melwaram—Lessee in occupation under unregistered lease a trespasser where lease registrable—Damages.

Future rent is a benefit to arise out of land within the meaning of the Registration Act, and consequently a lease of the melwaram right for a future year is compulsorily registrable if the value of the interest created by the document is Rupees one hundred or upwards.

A person occupying land under a lease which is inadmissible in evidence for want of registration is a trespasser and consequently liable in damages to the real owner.

Second appeal from the decree of the District Court of Madura in A. S. No 581 of 1905 presented against the decree of the Court of the District Munsif of Paramakudi in O. S. No. 693 of 1904.

The Advocate-General (P.S. Sivaswami Aiyar) for appellant.

S. Srinivasa Aiyangar for respondent.

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*S. A. 1469 of 1907. 25th February 1910.

Mangala sami v. Subbiah Pillay.

The Court delivered the following

JUDGMENT:—The plaintiff is the owner of a fourth share in the *melwaram* right of Kavoor village. The 1st defendant having obtained a decree in O. S. No 24 of 1898 in the Subordinate Court of Madura, East, for a three-twentieth share of the *melwaram* right, the plaintiff's guardian entered into an arrangement with the 1st defendant whereby the 1st defendent was to have a mortgage of the plaintiff's right to the fourth share of the rents due to him from Fasli 1310 as security for the 1st defendant's share of the rents for Faslis 1307 and 1308 unlawfully received by the plaintiff's father. The transaction was in substance a mortgage of future rents due for the plaintiff's share to the 1st defendant. Both the Courts below have held that the document being unregistered was inadmissible in evidence. The Munsif gave a decree to the plaintiff for the sum of Rs. 495-8-6, holding that the 1st defendant was a trespasser. The District Judge, on appeal, has dismissed the plaintiff's suit. He has come to the conclusion that the act of the *de facto* guardian, the 4th defendant, in placing the 1st defendant in possession of the plaintiff's fourth share was *bona fide* and justifiable, and although Exhibit *I* was inadmissible, the 1st defendant could not be treated as a trespasser and the plaintiff was, therefore, not entitled to any damages. In support of this second appeal the learned Advocate-General argues that the 1st defendant's possession and his right to appropriate the plaintiff's share of the rents towards his claim for Faslis 1307 and 1308 only arose under the mortgage Exhibit *I*, and on the footing that that instrument was invalid the defendants' possession could only be treated as that of a trespasser and that the plaintiff was, therefore, entitled to recover. We think this contention must be upheld. The learned vakil for the respondent did not attempt to support the judgment of the District Judge on the ground stated by him, but he argues that Exhibit *I* was receivable in evidence because it did not require registration. We are unable to agree with this view. The document was a mortgage of the plaintiff's right to future rents. It was over one hundred rupees in value. By S. 3 of the Registration Act immoveable property is defined as including "any other benefit" to arise out of land. The question is whether future rents payable in respect of land are benefits to arise out of land. It has never

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been doubted that a lease by a Zemindar or a transfer by him of the Zemindari interests, which is generally the right to the *melwaram*, is a transfer of immoveable property. If the assignment is, however, of an arrear of rent, the benefit has already arisen out of the land and is therefore outside the definition of "immoveable property." It has been held that a lease of a right to market dues upon a certain land requires registration as an instrument dealing with a benefit to arise out of land—see *Sikandar v. Bahadur* [1]—though the profits which have already accrued from a lambardar were held not to fall within the definition of immoveable property—see *Damodhar Das* v. *Gidari Lal.* [2] The decision in *Venkaji Babaji Naik* v. *Shidramapa Balape Desai* [3] seems almost exactly to cover the present case. There a right to assessment due upon certain land was assigned by an unregistered instrument. It was held that the instrument required registration as the assesment had not accrued due at the date of the assignment, but was only to become due in the future. It has no doubt been decided that a sale of indigo crop of the coming year operates merely as an agreement to convey that the conveyance takes effect only after the crops have come into being—see *Misri Lal* v. *Mozhar Hassain* [4] and *Bansidar* v. *Sant Lal* [5]. No question arose in these cases as to registration, though it may be pointed out that growing crops are within the definition of moveable property. The principle laid down in those cases is in accordance with *Collyer* v. *Isaacs* [6] and *Holroyd* v. *Marshall.* [7] Sir *George Jessel* observes in the first of these cases: "A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in future, and, when it has come into existence, equity treating as done that which ought to be done fastens upon that property, the contract to assign thus becomes a complete assignment." We do not know if the rule here laid down as to after-acquired chattels has anything to do with the assignment of future rents which a lease of the *melwaram* generally is. But, however this may be, the question narrows itself to this: "Whether, within the meaning of

1. (1905) I. L. R. 27 A 462.
2. (1905) I. L. R. 27 A. 564.
3. (1895) I. L. R. 19 B. 663.
4. (1886) I. L. R. 13 C. 262.
5. (1887) I. L. R. 10 A. 133.
6. (1881) 4 R. 19 Ch. D. 362.
7. (1862) 10 H. L. C. 191.

the Registration Act, future rent is a benefit to arise out of land? If that should be so, we have only to see whether the instrument purports to create or assign any right, title or interest in such property. It would be compulsorily registrable under S. 17 if the value of the interest which the document purports to create is one hundred rupees or upwards. We are, therefore, bound to hold that Exhibit *I* cannot be received in evidence and that there is no answer to the plaintiff's claim for damages.

In estimating the damages the District Judge has held that the defendants are entitled to reduction as regards some damage caused by fire: The Advocate-General has made no exception to this. The plaintiff's share, therefore, of the loss must be deducted from the damages awardable. The plaintiff is entitled to a decree for Rs. 496-8-5 minus Rs. 124-8-6.

The decree of the District Judge will be reversed and the plaintiff will have a decree for Rs. 372 against the 1st defendant personally with interest at 6 per cent per annum from this date and against defendants Nos. 2 and 3 to the extent of their share in the joint family properties. Each party will bear his own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

Sreemuth Devasikamani Pandara Sannadhi *alias* Nataraja Desikar	..	Appellant* (*Plaintiff*)
v.		
கு. ப. ள. த. Palaniappa Chetty and another	..	Respondents (*Defendants*).

Religious endowments—Trustee's powers of alienation over corpus—Trustee's position—"Necessity," meaning of.

Nataraja Desikar v. Palaniappa Chetty.

An alienation of temple property on a permanent lease at an unvarying rent on a fixed premium is not sustainable though it was a house site and was not producing any income before the date of alienation. [*Maharanee Shibes souree Debia* v. *Mathooranath Acharji*[1], *Mayandi Chetti* v. *Chokkalingam Pillay*[2], *Abhiram Goswami* v. *Shyama Charan Nandi*[3], referred to and followed] and the fact that the alienation was in favour of a charitable institution or for the supposed good of the public is irrelevant to the consideration of the question.

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* S. A. No. 1742 of 1908. 18th October 1910.

1. (1869) 13 M. I. A. 270.
2. (1904) I.L.R. 27 M. 291.
3. (1909) I.L.R. 36 C. 1003.

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Obiter :—A Shebait is in a position analogous to that of the guardian of an infant heir; and he cannot alienate the corpus of the estate except for sufficient necessity. A decree can also be passed against the corpus of the property. A necessity justifying alienation of rent and income will not be such as will justify an alienation of the corpus. Alienations of the corpus ought only to be resorted to as extreme measures in the absence of other reasonable means of providing for the needs of the temple. The requirements of daily worship, of buildings suitable for the carrying on of such worship and even of the essential festivals intended to cultivate the religious emotions of the section of the public for whose benefit the temple is dedicated, may afford grounds for the alienation of part of the corpus.

Necessity as regards an human infant and an idol may vary.

[Observations in *Vidyapurna* v. *Vidyanidhi*[1] commented on and doubted. *Abhiram Goswami* v. *Shyama Charan Nandi*[2] and *Kunwar Doorganath Roy* v. *Ram Chunder Sen*[3] explained.]

Second appeal from the decree of the Court of the Additional Subordinate Judge of Madura in A. S. No. 466 of 1906 presented against the decree of the Court of the District Munisif of Shivagunga in O. S. No. 10 of 1905.

S. Srinivasa Aiyangar for appellant.

K. Srinivasa Aiyangar for respondents.

S. Srinivasa Aiyangar, for appellant, contended that in the absence of unavoidable necessity (*Abhiram Goswami* v. *Shyama Charan Nandi*[2]) it is not competent to the trustee of a temple to grant a permanent occupancy right—*Nallayappa Pillai* v. *AmbalavanaPandara Sannadhi*[4]; *Narasimhachari* v. *Gopala Aiyangar*[5]; *Shyama Charan Nandi Abhiram Goswami*[6]; *Jnananjan Banerjee* v. *Adormoney Dossee*[7]—much less a sale which the transaction in this case in effect is. The fact that it is usually done is no justification. Prudent course of management is not the test of the validity of a trustee's alienation but necessity—*Attorney-General Parigter*[8]; TUDOR, p. 284. Even if the deed of trust permitted, such an alienation would not be justifiable—*Jugmohun Das* v. *Pallaya*[9].

K. Srinivasa Aiyangar, for respondents, relied upon *William Charles Quinn* v. *Thomas William Hungerford*[10] and TUDOR, pp. 271 and 282 for the position that customary mode of enjoyment will be upheld, and distinguished *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi* [4] on the ground that the land there was ryotwari land and therefore creation of occupancy

1. (1904) I.L.R. 27 M. 435, 465.
2. (1909 I.L.R. 36. C. 1003.
3. (1876) 4 I. A. 52.
4. (1904) I. L. R. 27 M. 466.
5. (1905) I. L. R. 28 M. 391.
6. (1906) I L. R. 33 C. 511.
7. (1909) 13 C. W. N. 805.
8. (1843) 49 E. R. 783.
9. (1896) I. L. R. 22 B. 1.
10. (1834) 6 E. R. 1189.

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right would be unusual, and *Abhiram Goswami* v. *Shyama Charan Nandi*[1] on the ground that no question of prudent management arose in that case.

S. Srinivasa Aiyangar, in reply, cited *St. Mary Magdalen, Oxford* v. *Attorney-General*[2] and contended that the sale could not ordinarly be justified as the object of the founder was presumably that the land should continue perpetually dedicated to charity.

The Court delivered the following

JUDGMENT :— The question is raised whether a permanent lease by the trustee of a temple of building site belonging to the temple for a *nuzzar* or a premium is valid. It is argued for the appellant that such a lease constitutes a breach of trust and is therefore invalid. The Subordinate Judge, in appeal, has upheld the lease on the ground that it was made in the proper and reasonable exercise of the power of the trustee and in accordance with local usage, and was, therefore, an act of prudent management on his part. Assuming that local usage would, at all events, be an element in the determination of the question whether the lease was an act of prudent management, it is difficult to uphold the finding in its favor, as the earliest instance on record of such a lease was as late as 1870 and the other instances in evidence are only a few in number and not all of them permanent tenures. We are unable to hold that the evidence is sufficient to support a custom. That the alienation in question was in favor of a charitable institution or for the supposed good of the public is, in our judgment, no ground for upholding it if it is otherwise not in accordance with law. Putting aside, then, these considerations as irrelevant, we are face to face with the problem whether an alienation of temple property on a permanent lease at an unvarying rent or a fixed premium is sustainable because it is a house site and was not producing any income before the date of the alienation. This question must be answered in the negative in the light of the definite pronouncements of the Privy Council in *Maharanee Shibessouree Debia* v. *Mathooranath Acharjo*[3]; *Mayandi Chettiyar* v. *Chokkalingam Pillay*[4] and *Abhiram Goswami* v. *Shyama Charan Nandi*[1]. In the first of these cases, where a permanent

1. (1909) I.L.R. 36 C. 1003.
2. (1857) 10 E. R. 1267.
3. (1869) 13 M. I. A. 270.
4. (1904) I. L. R. 27 M. 291.

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lease by a *shebait* was in question the Judicial Committee observed: "In the exercise of that office, she (the shebait) could not alienate the property, though she might create proper derivative tenures and estates conformable to usage"—p. 273. Again at p. 275 their Lordships said: "There is no satisfactory proof in the cause that these *jummas* were ever held at a fixed invariable rent. One important element in this enqury has been wholly lost sight of, *viz.*, the nature of the shebait's title and its legal inability to be the source of such a derivative title. To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent, from time to time, would be a breach of duty in a shebait and is not therefore presumable." What follows from the above is not that a permanent lease is under all circumstances absolutely invalid but that it is *prima facie* in excess of the powers of a shebait. See PRAN NATH SARASVATI'S *Tagore Lectures* on the *Hindu Law of Endownments*, p. 146. In the next case which dealt with the creation of a permanant right of occupancy (*Mayandi Chettiar* v. *Chokalingam Pillai* [1]) the Privy Council observed at p. 295, quoting the decision in *Maharanee Shibessouree Debia* v. *Mathooranath Acharya* [2]: The creation of a new and fixed rent for all time would be a breach of duty in the trustee unless there were special circumstances of necessity to justify it." In their latest pronouncement, already referred to, their Lordships of the Privy Council say (*Abhiram Goswami* v. *Shiyama Charan Nandi* [3]) that the general rule as regards a trustee's power to alienate *debutter* property is that laid down in *Maharanee Shibessouree Debia* v. *Mathooranath Acharjo*[2] and held that a *mokurari* or permanent patta by a shebait was invalid. It has also been held in this Court, following the decisions of the Privy Council, that a permanent lease at a fixed rate is invalid, and that a trustee has no power to create a perpetual tenure except on special grounds or circumstances of necessity—*Mahomed Meera Usain Rowthen* v. *Nizurali Sahib*[4] and *Narasimhachari* v. *Gopala Aiyangar* [5]. The fact that in the present case the property leased is a building site does not appear to be any justification for leasing the property

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1. (1904) I.L.R. 27 M. 291.
2. (1869) 13 M.I.A. 270.
3. (1909) I.L.R. 36 C. 1003.
4. (1908) 19 M. L. J. 208.
5. (1905) I. L. R. 28 M. 391.

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at an unvarying rent. Building sites of all lands are particularly susceptible of a continuous rise in value where the locality increases in prosperity or there are increased facilities of communication or there is an increase in population. The foregoing observations are sufficient for the disposal of the case. They lead to the conclusion that the lease in question in the present case cannot be upheld.

The question, however, has been argued as regards the limits of the power of a trustee of a temple property. Mr. S. Srinivasa Aiyangar, in his able argument, contended for the broad proposition that a permanent alienation or the creation of a permanent tenure is under all circumstances invalid, and he relied on the decision of *Subrahmanya Aiyar*, Offg. Chief Justice, and *Russell* J. in *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi* [1], and on the observations of *Subrahmanya Aiyar* and *Bhashyam Aiangar* JJ. in *Vidyapurna Thirthaswami* v. *Vidyanidhi Tirthaswami*[2]. The former of these cases proceeds upon the Privy Council decision in *Maharanee Shibessouree Debia* v. *Mathooranath Acharjo*[3] and on the decisions of the Bombay High Court in *Narayan* v. *Chintaman*[4] and *The Collector of Thana* v. *Hari Sita Ram*[5]. There are observations in these cases which go far to support the appellant's contention. Sir *Subrahmanya Aiyar* in *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi*[1] says: "According to the Indian common law relating to Hindu religious institutions such as the present, the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with reference to such endowments, they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. The revenues thereof may alone be pledged for the necessities of the institutions." Chief Justice *Westropp* makes use of similar language in *Narayanan* v. *Chintaman*[4]. He says at p. 396: "Religious endowments in this country are not alienable, though the annual revenues of such endowments, as distinguished from the *corpus*, may, for purposes essential to the temple or other institutions endowed, be occasionally pledged." The lands dealt with in that case had been dedicated for the

1. (1904) I. L. R. 27 M. 466.
2. (1904) I. L. R. 27 M. 435.
3. (1869) 13 M. I. A. 270.
4. (1881) I. L. R. 5 B. 393.
5. (1882) I.L.R. 6 B 546.

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support of a temple and not for a mere family idol. But nothing in that judgment appears to have turned on that distinction. The same eminent Judge says in *The Collector of Thana* v. *Hari Sita Ram*:[1] " A Hindu Religious Endowment cannot be sold or permanently alienated, though its income may be temporarily pledged for necessary purposes, such as the repair, etc., of the temple." Observations to the same effect are to be found in the judgment of Sir *V. Bhashyam Aiyangar* at pp. 450 and 451 in *Vidiyapurna Tirthaswami* v. *Vidyanihhi Tirthaswami*[2]. With all respect to these very learned Judges it appears to me that the language employed in these cases is a little too wide. I know of no text of the Hindu Law that absolutely prohibits the alienation of the *corpus* of the temple property where there are sufficient circumstances of necessity requiring it. What would amount to such necessity may be a question not easy of solution in the circumstances of each case. But if a proper necessity is made out, I feel no doubt that the alienation ought to be upheld. It seems to me that the authority of the Privy Council is distinctly in favour of the view that the alienation should be upheld if the necessity is made out. There appears to be no distinction in this matter, as shown by Mr. Justice *West* in his learned judgment in *Manchar Ganesh Tambeker* v. *Laxshmiram Govindram*[3], between a religious institution like a temple dedicated to an idol and a charitable foundation. In the most recent cases on the subject to which reference has already been made, the Privy Council likened the powers of the shebait of an idol to that of the manager of an infant heir. See *Abhiram Goswami* v. *Shyama Charan Nandi*[4]. In *Prosunno Kumar Debia* v. *Golab Chand Baboo*[5] also, which appears to have been somewhat misunderstood, their Lordships made the same observation, that the authority of the shebait of an idol's estate was analogous to that of the manager of an infant heir, and cited Lord Justice *Knight-Bruce* in *Hanuman Pershaud's case*[6] as regards a manager's powers of alienation. The remarks of their Lordships in that case, which was one to set aside a prior decree against the preceding trustee, that that decree had been rightly made against the rents and profits of *debutter* lands (see p. 153) and that no question was raised whether the

1. (1882) I. L. R. 6 B. 546.
2. (1904) I. L. R. 27 M. 435.
3. (1887) I. L. R. 12 B. 247.
4. (1909) I. L. R. 36 C. 1003.
5. (1875) 2. I. A. 145.
6. (1856) 6 M. I. A. 393.

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lands themselves could be sold undee the decree, have been taken to imply that a decree could not be passed against the *corpns* of the temple property. I cannot agree that there is any warrant ofr placing such a construction on the decision of their Lordships in the face of the express statement that the powers of a shebait were those of a manager of an infant heir which undoubtedly extend to the alienation of the *corpus* and the quotation from *Hanuman Pershaud's case*[1] of the passage which upholds the validity of an alienation in favor of a *bona fide* lender after due enquiry notwithstanding the manager's wrong application of the money borrowed. Their Lordships expressly assert (p. 152): "It would seem to follow that the persons so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least in as great a degree as the manager of an infant has. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued, for want of the necessary funds to preserve and maintain them." Language more precise it is difficult to employ to define the powers of the trustee of a temple or the shebait of an idol. See also PRAN NATH SARASVATI'S *Tagore Lectures* on the *Hindu Law of Endownments*, p. 152. Their Lordships commended the prior decree against rents and profits only as proper because necessity, which may be sufficient for the charging of the rents and profits, is not sufficient for the alienation of the *corpus.* If thereshould still be any possibility of a misconception of their Lordships' view of the limits of a trustee's powers of alienation, that is completely removed by the decision in *Kunwar Doorganath Roy* v. *Ram Chander Sen*[2]. In that case also, dealing with the powers of the shebait of an idol, their Lordships, at p. 63, repeat the analogy of the manager of an infant heir and cite the well known observations in *Hanooman Pershaud's case*[1]. The question there related to the sale of *debutter* property. At p. 56 they say: "She (the shebait) had, as the manager of the estate, power, if it were *debutter* dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol." At page 63 they repeat: "She, as the manager of the estate, had the same right or an analogous right to that of the manager of an infant heir." Their

1. (1856) 6 M. I. A. 393. 2. (1876) 4 I. A. 52.

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Lordships indeed proceeded so far as to hold the alienation justifiable on the ground of *bona fide* inquiry by the purchaser and "representation by the alienor that the sale was made for the purpose of the repair of the temple. It is unnecessary to point out that the manager of an infant heir may absolutely alienate his property in a case of need or of benefit to the estate; that in a case of honest inquiry by the alienee the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge and that under such circumstances he is not bound to see to the application of the money." The Privy Council spoke of the need and necessity referred to in *Hanooman Pershaud's case*[1] as legitimate family purposes in *Suraj Bunsi Koer* v. *Sheo Prashad Singh*[2]. Of course in the case of an idol the inherent difference in its character from a human infant must create differences in the circumstances constituting necessity sufficient to validate the alienation. The physical and moral requirements of a human infant are, of course, different from the requirements of an idol or an object of public worship suited to the faith and rituals and religious traditions of the community for whose spiritual ministration it has been set up. The requirements of daily worship, of buildings suitable for the carrying on of such worship, and even of the essential festivals intended to cultivate the religious emotions of the section of the public for whose benefit the temple is dedicated, may afford grounds for the alienation of part of the *corpus* of the property of the temple. That such alienations ought only to be resorted to as extreme measures in the absence of other reasonable means of providing for the needs of the temple may well be accepted as the canon of judgment in regard to the validity of particular alienations. I have thought it necessary to make these observations to guard us from being supposed to accept without qualification some of the language employed in *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi*[3] and *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*.[4]

Certain English cases were referred to in the course of the argument. The Law in England is at present embodied in Statutes. Before their enactment it will be found that a similar test has

1. (1856) 6 M. I. A. 393. 2. (1878) 6 I. A. 88 at p. 101.
3. (1904) I. L. R. 27 M. 465. 4. (1904) I. L. R. 27 M. 435.

been laid down in England with regard to the validity of alienations of charity property. See TUDOR'S *Charitable Trusts*, IV Edn., pp. 271 272, also the decision in *William Charles Quinn* v. *Thomas William Hungerford*[1] and the cases cited by the LORD CHANCELLOR and by the eminent Counsel who argued the case on both sides. There seems to be no doubt that in the actual application of the rule as to necessity English Courts have been very stringent. A permanent lease at an unvarying rent would have little or no chance of appoval by them. It is unnecessary to pursue this matter.

As regards the present case we must, on the authority of the Privy Council cases cited in the earlier part of this judgment, set aside the decree of the Subordinate Judge and restore that of the Munsif. No claim was made in the written statement for the value of improvements and no issue was raised as to whether the defendants were entitled to it. We must decline to allow the defendants to raise it now. They will pay the plaintiff's costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Munro.

Sankarappa Naiken .. Appellant* (*Plaintiff*)

v.

The Secretary of State for India in Council through the Collector of Madura .. Respondent (*Defendant*).

Madras Revenue Recovery Act (*II of* 1864) *S.* 59 "*Suit for refund of assessment and declaration and injunction—Six months' limitation.*

A suit for declaration and injunction as regards an order for removal of steps and for recovery of penal assessment, all arising out of the same cause of action, is not maintainable even as to any part thereof, if brought after 6 months from the date of the cause of action, by reason of S. 59 of the Revenue Recovery Act.

Sankarappa Naicken v. Secretary of State.

Second appeal from the decree of the Temporary Subordinate Judge's Court of Madura in A. S. No 525 of 1907 presented against the decree of the Court of the District Munisif of Tirumangalam in O. S. No. 14 of 1906.

Suit for a declaration and injunction as regards an order for the removal of certain steps and for refund of penal assessment levied by the defendant (Government) from the plaintiff, the

* S. A. 1578 of 1908. 6th April 1910.

1. (1834) 6 E. R. 1189.

Sankarappa Naicken v. Secretary of State.

levy purporting to be under the Revenue Recovery Act. The lower Court dismissed the suit as barred by the limitation provided by S. 59 of the Revenue Recovery Act.

P. C. Lobo for plaintiff-appellant.

The Government Pleader (*C. F. Napier*) for the defendant-respondent (Government.)

P. C. Lobo :—The penal assessment is not revenue and the provisions of the Revenue Recovery Act would not apply—*Madathappu Ramayya* v. *Secretary of State*.[1] [*Court*.—The levy was professedly under the Act, so S. 59 should be applied. *Venkata* v. *Chengadu*[2] is against you.] There the sale was as if for arrears of revenue. My suit for declaration and injunction cannot be barred under S. 59, for in respect of them the proceedings ordering the removal of the steps are not professed to have been done under the Revenue Recovery Act.

The Government Pleader :—The period of limitation against orders for removal under Act III of 1905 is only six months, as under S. 59, after an illegal sale as if for arrears of revenue, no suit could be brought after six months for recovering the land from the purchaser. Therefore a mere declaration for such a purpose also would be barred if not brought within six months—*Raja Goundan* v. *Raja Goundan*[3].

P. C. Lobo :—In the illustration given by the Government Pleader the proceedings must necessarily be under the Act.

The Court delivered the following

JUDGMENT.—The assessment in this case was realised by proceedings professedly taken under S. 59 of Act II of 1864, and therefore the suit should have been brought within the period of six months provided by that section.

It is contended that though the suit may be barred in so far as it seeks to recover the assessment levied, still it is not barred so far as the declaration and injunction prayed for are concerned.

The necessity for asking for these reliefs all arise out of the action of Government in levying the assessment, and is part of the grievance for which under S. 59 the plaintiff may apply to the Civil Court for redress.

The second appeal is dismissed with costs.

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1. (1903) I. L. R. 27 M. 386, 389. 2. (1888) I. L. R. 12 M. 168.
4. (1893) I. L. R. 17 M. 134.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

P. L. S. A. R. S. Chettiappa Chettiar .. Appellant* (*Plaintiff*)

v.

N. Periasami Thevan & another .. Respondents (*Defendants*).

Chettiappa Chettiar *v.* Periasami Thevan.

T. P. A., S. 78—Priority of mortgages—Gross negligence—Consideration.

The same importance does not attach to the possession of title deeds in the mofusil as in the City of Madras and facility in inspecting the registry provided by the Registration law should be taken into account in determining whether there was gross negligence in the prior encumbrancer.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Madura in A. S. No. 54 of 1908 presented against the decree of the Court of the District Munsif of Periakulam in O. S. No. 409 of 1906.

Krishnaswami Aiyangar for *T. Narasimha Aiyangar* for appellant.

S. Srinivasa Aiyar for respondents.

Krishnaswami Aiyangar.—The question in this case is whether the prior sub-mortgagee has lost his priority by gross neglect in leaving the title deeds with the original mortgagee who was thus enabled to create a sub-mortgage in my favour. The later sub-mortgagee is held by the lower Court not entitled to take advantage of this by the fact that he did not enquire in the Registration office of the existence of the previous sub-mortgage. In the Madras Presidency registration has been held not to be notice—*Shan Maun Mull* v. *Madras Building Company*[1]. This case has also held that parting with title deeds is gross neglect entailing a postponement of one's rights to those of others affected thereby. *Vide* also the judgment of the original court in the above case *viz.*, *Madras Building Company* v. *Rowlandson*[2] and *Rangasami Naiken* v. *Annamalai Mudali*[3]. [*V. K. Aiyar* J.—In the Madras town case the reason for holding that there was gross negligence was that the second mortgage was one by deposit of title deeds in which case the only safeguard is the possession of these title deeds. In the Mofussil, people

*S. A. No. 1951 of 1908. 24th March 1910.

1. (1891) I. L. R. 15 M. 268 2. (1029) I. L. R. 13 M. 383.

3. (1907) I. L. R. 31 M. 9.

'hettiappa Chettiar v. Periasami Thevan.

do not always very much care for title deeds. Gross negligence is a question of fact. Duty to search in the registration office is a circumstance to the taken into consideration in weighing whether there was gross negligence.]

The Court delivered the following

JUDGMENT:—The Subordinate Judge finds that there was not gross negligence in the circumstances of this case on the part of the 11th defendant, the prior mortgagee. The Subordinate Judge has accepted the 11th defendant's explanation for not having been possessed himself of the title deeds. We are also disposed to agree with the decision in *Rangasami Naicken* v. *Annamalai Mudali* [1], where it is pointed out that the same importance does not attach to the possession of the title deeds in the mofussil as in the city of Madras, and that facility in inspecting the registry provided by the registration law should be taken into account in determining whether there was gross regligence in the prior encumbrancer. We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Miller.

Arunachala Nadan .. Appellant*

v.

Kandasami Pillai & others .. Respondents.

C. P. C. O. 38 r. 5, O. 1 r. 4 (a)—Transfer of case—Pending attachment—Jurisdiction to deal with.

andasami Pillai v. 'unachala Nadan

Where in a suit, the Court had passed a conditional order of attachment, but before passing the final order, the suit was transferred to another Court: *Held* the latter Court had jurisdiction to deal with the pending attachment.

Second appeal from the decree of the Temporary Subordinate Judge's Court of Madura in C. S. No. 636 of 1907 presented against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 336 of 1906.

The 3rd defendant owned a house site. He mortgaged it on 5-9-1900 to 1st defendant for Rs. 150. 1st defendant sub-mortgaged his interest first to 4th defendant and then again to 2nd defendant. The mortgage to the 4th defendant was by two instruments dated 25-6-01 and 3-4-03. The mortgage to 2nd defendant was on 13-7-03. The 4th defendant assigned his mortgage right to 2nd defendant on 13-9-03. Thus the second

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* S. A. No. 1712 of 1908. 18th March 1910.

1. (1907) I.L.R. 31 M. 9.

Arunachala Nadan *v.* Kandasami Pillai.

defendant became the sole mortgagee of the 1st defendant. In O. S. 514 of 04 2nd defendant obtained a decree on all the three mortgage bonds against 1st defendant on 30-11-04.

Plaintiff instituted Small Cause Suit No. 812 of 1903 on the file of the West Sub-Court against 1st defendant for money. It was transferred to the East Sub-Court and numbered as 827 of 1903. Before the transfer plaintiff had applied for attachment before judgment of the debt due by 3rd defendant to 1st defendant and the West Sub-Court had ordered notice and conditional attachment. The petition came on for final orders after the transfer of the suit to the East Sub-Court and the following order was passed by that Court:—"Served. Appears and has no objection. Attachment confirmed."

The question was whether the East Sub-Court had jurisdiction to confirm the order for attachment. Both the obligor and the obligee of the debt resided outside the jurisdiction of the East Sub-Court.

K. N. Aiya for appellant.

G. S. Ramachandra Aiyar for *K. R. Subramania Sastri* for respondents.

The Court delivered the following

JUDGMENT:—In this case a conditional order of attachment before judgment of certain property within its jurisdiction was made by the Subordinate Court of Madura, West. Subsequently, before the order was made absolute, the suit was transferred to the Subordinate Court of Madura, East.

The effect of the transfer was to deprive the Subordinate Court, West, of the power to pass any further order with regard to the attachment as the suit was no longer pending there. Unless, therefore, it be held that the Subordinate Court, East, acquired jurisdiction to pass further orders regarding the attachment by virtue of the transfer, there would be no Court capable of raising the attachment or making it absolute. This can hardly have been intended by the Legislature and reading sections 25 and 483 of the Code of Civil Procedure of 1882 together, we think that power to deal with the pending attachment must be taken to have been transferred by implication to the East Subordinate Court when the suit was transferred to it. This was the point upon which the case was decided in the lower Courts. We must set aside the decrees of the lower Courts and remit the case to the District Munsif for disposal according to law. Costs will abide the event.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Krishnaswami Aiyar.

N. Ekambareswara Iyer .. Petitioner*
v. (*Appellant*)
M. Veerabadra Thevan & others .. Counter-Petitioners (*Respondents*).

Ekambareswara Iyer *v.* Veerabadra Thevan.

Cr. P. C., S. 195 (*a*) & (*c*)—*Application for sanction—Transfer.*

No transfer of an application for sanction can be made to a Court other than the one to which the Court in which the offence was committed, is subordinate, a sanction granted by such other Court being useless for the purpose of starting a prosecution.

Their Lordships also thought they need not in the case before them transfer the application to the High Court.

Application praying that, in the circumstances stated in the affidavit filed therewith, the High Court may be pleased to direct the transfer of Criminal Miscellaneous Petition No. 27 of 1910 from the file of the Sessions Court of Madura to that of some other Sessions Court.

M. K. Narayanasami Aiyar for petitioner.

S. Swaminathan for respondents.

S. Swaminathan, for respondents, took a preliminary objection that the application cannot be transferred because, under S. 195, the sanction of any Court other than the Court in which the offence is committed or of the Court to which such Court is subordinate, is useless. The only Court to which it could be transferred is the High Court. No object is served in transferring it to the High Court as there is an appeal from the Sessions Judge's order to this Court. He relied upon the analogy furnished by *In the matter of the Petition of Amar Singh*[1] and *Emperor* v. *Mohendra Singh*[2].

[See *per contra* 7 A. L. J. 813.—ED.]

M. K. Narayanasami Aiyar, for petitioner, argued that S. 195 is to be taken as subject to the qualification introduced by S. 526 which gives the power of transfer; also that the Sessions Court to which the case is transferred will take the place of the Sessions Court from which it is transferred and as such will come within S 195; cf. S. 126, Cl. (2).

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* C. M. P. No. 258 of 1910. 25th August 1910.

1. (1893) I. L. R. 16 A. 9. 2. (1907) I. L. R. 30 A. 47.

Ekambareswara Iyer v. Veerabadra Thevan.

The Court made the following

ORDER :—This is an application for transfer of a petition to grant sanction to prosecute a person accused of offences falling within Clauses (*a*) and (*c*) of S. 195 of the Code of Criminal Procedure. That section enacts that no Court shall take cognisance of any of the offencos enumerated in Clauses (*a*) and (*c*) of the section except with the previous sanction, or on the complaint, of the Court in which, or in relation to a proceeding in which, the alleged offence is committed, or of some other Court to which that Court is subordinate.

Assuming then that S. 26 of the Criminal Procedure Code gives us power to transfer the application as being a criminal case, the language of S. 195 indicates that any transfer so made would be ineffective and futile unless the transfer was made to a Court to which the Court before which the application is pending is subordinate, for no Court could take cognizance of the case on a sanction granted by any Court not mentioned in the section. No authority on this question has been cited before us, but we think we ought not, in this view of the section, to make the transfer applied for, and we are not inclined to adopt the suggestion that we should transfer the case to this Court, as it can, if necessary, be brought here by way of appeal.

In the Allahabad High Court it has been held in *In the matter of the Petition of Amar Singh*[1] followed in subsequent cases (vide *Emperor* v. *Mahendra Singh*[2]) that the High Court cannot transfer a case under S. 110 of the Criminal Procedure Code to any Magistrate other than one within whose local jurisdiction the person is found against whom proceedings are instituted. The reasoning in this case supports the view we take of S. 195.

We therefore reject the petition.

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1. (1893) I. L. R. 16 A. 9.
2. (1907) I. L. R. 30 A. 47.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Antony Cruz Gonzalves .. .. Appellant* (*Plaintiff*)

v.

Mathis Boopalrayan .. .. .. Respondent (*1st Defendant*)

Gonzalves v. Boopalrayan

Succession Act, S. 191—Dealings with property by heirs before grant of Letters of Administration.

The provision in the Succession Act as to the Letters of Administration relating back does not vest the property in the administrator before the grant of administration; and, consequently, until the grant of Letters of Administration, the dealings of the heirs with regard to the property are valid and binding on the administrator, especially when the dealing were after Act VII of 1901 had made Ss. 190 and 239 inapplicable to Native Christians.

Second appeal from the decree of the District Court of Tinnevelly in A S. No. 237 of 1907 presented against the decree of the Court of the District Munsif of Tuticorin in O. S. No. 386 of 1906.

Joseph Satya Nadar for appellant.
G. Devasagayam for respondent.

The parties were Native Christians to whom the Indian Succession Act applies.

The plaintiff purchased the plaint house on 28th January 1905 from 2nd defendant, the widow of Susai Maria Kaitan Machado, who was appointed administratrix of her deceased husband's estate by an order of the District Court dated 5th January 1905.

The suit was brought to establish the plaintiff's title in the plaint property and for a declaration that the hypothecation made by defendants 3 and 4, sons of the deceased man, and the sale in favour of the 1st defendant were not valid, and to restrain the 1st defendant from taking delivery of the property.

Defendants 3 and 4, after their father's death, mortgaged the property on May 19th, 1891, to the 1st defendant. The 1st defendant brought O. S. No. 392 of 1901 upon the mortgage deed, obtained a decree, and purchased the property in execution.

* S. A. No. 899 of 1908. 18th March 1910.

Gonzalves v. Roopalraya

The lower Courts held that the plaintiff was entitled to a declaration in respect of two-thirds of the plaint property, but dismissed the suit as regards the remainder.

J. Satya Nadar, for the plaintiff—contended that the 1st defendant took nothing under the mortgage. In defendants 2 and 3 the property did not become vested. It vested in the administratrix, and the plaintiff who claims under her is entitled to the full relief claimed by him—*Sukh Nandan v. Rennick*[1]; *Framji Doraji Ghaswala* v. *Adarji*[2].

G. Devasagayam, for the respondent:—Section 179 does not prevent defendants 2 and 3 from hypothecating. There was no thing to administer and it cannot be said that the mortgage was invalid.

The Court delivered the following

JUDGMENT:—One Machado, a Native Christian, died in 1885 leaving a widow, the 2nd defendant, two sons, the 3rd and 4th defendants, and two daughters. Defendants Nos. 3 and 4 hypothecated the suit property in 1891 to the 1st defendant. The 1st defendant instituted a suit upon the mortgage in 1901 and purchased the property. The 2nd defendant, the widow, obtained Letters of Administration in January 1905, and sold the property to the plaintiff. The Courts below upheld the sale to the 1st defendant to the extent of the one-third share of defendants Nos. 3 and 4 and gave a decree to the plaintiff for two-thirds of the suit property. The plaintiff has preferred this second appeal. Sections 190 and 239 of the Succession Act have, by Act VII of 1901, been made inapplicable to Native Christians. Section 179 provides that the executor or administrator of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such. An 'executor' is defined as a person to whom the execution of the last will of a deceased person is by the testator's appointment confided. So property of the testator vests in the executor on the death of the testator at once, irrespective of probate. But an 'administrator' is a person appointed by competent authority to administer the estate of a deceased person; so until he is appointed by Court the property of the deceased cannot vest in him. But S. 191 enacts that once Letters of

1. (1882) I. L. R. 4 A. 192. 2. (1893) I. L. R. 18 B. 337.

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Administration are granted, they entitle the administrator to all the rights of the intestate as effectually as if the administration had been granted at the moment after his death. The sons were entitled to a third share and when no administrator was appointed they were entitled to deal with it. The decree in the mortgage and the sale were subsequent to the repeal of S. 190 as regards Native Christians and were, therefore, valid to the extent of the interest of the 3rd and 4th defendants. Section 191 which makes the Letters of Administration relate back to the death of the intestate cannot, it seems to us, affect the right of the purchaser. In WILLIAMS on *Executors*, Vol. 1, page 468, there is the following statement of the law:—"On the other hand an administrator derives his title wholly from the Court. He has none until the Letters of Administration are granted and the property of the deceased vests in him only from the time of the grant." Later on, WILLIAMS adds: "The proposition, however, respecting the vesting of the administrator's interest must be taken with some qualification, for it seems clear that for particular purposes the Letters of Administration relate back to the time of the death of the intestate and not to the time of granting them." And he proceeds to give a number of instances where the Letters of Administration relate back to the time of the death of the intestate. This statement of the law is reproduced in S. 191 of the Indian Act. We must, therefore, hold that the provision in the Succession Act as to the Letters of Administrator relating back does not vest the property in the administrator before the grant of administration. The repeal of S. 239 as regards Native Christians strengthens the view that the heirs to the property of an intestate are not disentitled to deal with their shares until administration is granted, for the protection of the property by the District Court till the grant of administration has been taken away by the repeal. Act VII of 1901 has, moreover, authorized the issue of Succession Certificates for debts due to the estates of Native Christians. All this points to the intention of the Legislature that until the grant of administration the property of an intestate vests in the heirs sufficiently to enable them to deal with their interests. We must hold, therefore, that the plaintiff is not entitled to claim their one-third share.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Abdur Rahim.

Thiruvengada Mudaliar & another .. (Appellants*) (*Defendants*)

v.

S. Sadagopa Mudaliar .. .. Respondent (*Plaintiff*)

Partnership—Suit for general account barred—Suit for share of particular item, right of.

There is nothing to prevent a partner whose remedy for a general account against his other partners is barred from maintaining a suit for his share of a particular item received by his co-partners after the dissolution of the partnership.

Appeal from the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 33 of 1904.

K. Srinivasa Aiyangar for appellant.

T. R. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The main question argued in this appeal was whether a partner, whose remedy against his co-partner for a general account is barred, can recover his share of a particular item of the partnership assets which the co-partner received after the dissolution of the partnership. Mr. K. Srinivasa Aiyangar, who discussed the general principles relating to suits between partners at considerable length, was unable to cite any authority in support of his contention that such a suit cannot be maintained. He failed to convince us that there is anything in reason, or in the principles which ordinarily guide the Court in actions between co-partners, which should deter a Court from entertaining a suit like the present, if it be open to the defendant co-partner to ask the Court to take accounts with a view to show that the plaintiff had received more than his share in the partnership assets. This is the view of the law taken in *Sokkanadha Vanni Mundar* v. *Sokkanadha Vanni Mundar*[1] following *Merwanji Hormusji* v. *Rustomji Burgoji*[2] and *Dayal Jairaj* v. *Khatav-Ladha*[3], and is supported by the observations of more

* A. No. 222 of 1905 11th March 1910.

1. (1904) I. L. R. 28 M. 344.

2. (1882) I. L. R. 6 B. 628.

3. (1875) I. L. R. 12 B. H. C. R. p. 97.

Thiruvengada v. Sadagopa.

than one member of the House of Lords, who delivered judgments in *Knox* v. *Gye*[1]. It is not necessary for us to discuss the question at length as we generally agree with what is said on the subject in those cases. The plaintiff is, in our opinion, entitled to the half of Rs. 3,849-8-5 which was received by the defendant on the 2nd of February 1903. This sum is part of a sum of Rs. 4,000 which was deposited with the proprietor of the villages of which the plaintiff and the defendant took a lease in partnership. It was the case of the plaintiff that he had paid in the entire amount of Rupees 4,000, but, even if so, he would be entitled, in a suit like this, to only half of that amount in accordance with his interest in the partnership. And this his learned vakil has not disputed before us. But, if it were necessary for us to decide the question, we would be inclined to hold, upon the evidence, that the result of what happened between the partners was that the Rs. 4,000 deposited with the landlord consisted of Rs. 1,500 of the plaintiff's money and the balance the defendant's. The entire sum of Rs. 4,000 was originally paid by the defendant; then the plaintiff paid the defendant Rs. 3,500 on this account, and the defendant afterwards gave a cheque for Rs. 2,000 to the plaintiff's agent; but the common banker of both the plaintiff and the defendant, to whom the plaintiff sent the cheque, instead of crediting the amount to the plaintiff's account credited it to the defendant's account. The mistake of the plaintiff's banker cannot affect the payment made by the defendant.

The plaintiff is, therefore, entitled to a decree for the half of Rs. 3,849-8-5, and we do not think he is entitled to any interest on the sum due to him from the 2nd February 1903, the date on which the defendant received the amount from the landlord, to the date of the institution of the suit. The decree will be modified accordingly.

Subject to this modification, the appeal will be dismissed. As regards costs in the Court of the first instance, the parties will pay and receive proportionate costs.

In this Court they will bear their own costs.

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1. (1871) L. R. 5 H. L. 656.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

Kandaswami Pillai .. Appellant* (*Plaintiff*)

v.

Avayambal *alias* Thangachi Ammal . (Respondent) (*Defendant*).

Limitation Act, Arts. 61, 83, 116, 120—*Suit by Agent against Principal for refund of money spent—Starting point—" Contract"—Legal obligation to indemnify—No contract.*

The legal obligation of a principal to indemnify his agent under S. 222 of the Contract Act is not a "contract" to indemnify within the meaning of Art. 83 of the Limitation Act; nor is a suit for recovery of money paid by the agent for the principal governed by Art. 116 of the Limitation Act when the instrument evidencing the agency is registered in the absence of any contract in the instrument. A suit by the agent for recovery of money paid by him for the principal in meeting the expenses of the principal's litigation is governed by Art. 61.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 1,128 of 1906, presented against the decree of the Court of the District Munsif of Negapatam in O. S. No. 142 of 1906.

V. V. Srinivasa Aiyangar for appellant.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff was the defendant's agent under a Power of Attorney, the original of Exhibit *G.* He sues for the recovery of payments made by him for the expenses of certain litigations conducted by him on behalf of the defendant. The last of such payments was on the 6th of March 1901. The suit was instituted on the 4th April 1906. The Courts below have held the suit barred under Article 61 of the Limitation Act. The appellant contends, in the first place, that Artiсte 110 applies. That relates to a suit for compensation for breach of a contract in writing registered. There is no promise in the Power of Attorney to pay the plaintiff for advances made by him on account of his principal. Section 222 of the Contract Act provides that the employer of an agent is bound to indemnify him

* S. A. No. 29 of 1908. 17th March. 1910.

Kandaswami Pillai v. Avayambal.

against the consequence of all lawful acts done by such agent in exercise of the authority conferred upon him. Illustrations (*a*) and (*b*) to that section show that expenses incurred by the agent on behalf of the principal are consequences of the lawful acts of the agent in exercise of his authority. But the principal's duty to idemnify is no part of the contract. It is an obligation imposed by the law and is attached to the relation of principal and agent constituted by act of parties. Such an obligation, therefore, cannot be treated as part of the contract in writing registered. The decisions in *Krishnan Nambiar* v. *Kannan* [1] and in *Seshachala Naicker* v. *Varada Chariar*[2] were referred to, to show that obligations not expressed in writing but imported by the law in the case of sale, have been treated as in writing when the sale is made by a written instrument. We do not think that these cases compel us to hold that an indemnity, which is not a term of the contract nor to be deemed a part of the contract, but a mere obligation cast on the principal by the operation of law, is in writing registered within the meaning of Article 116.

It is next argued that Article 120 alone applies, and not Article 61. But before we go to this residuary Article, we have got to see whether there is no other Article which can be made applicable to the case. Articles 83 and 61 have been suggested. We think we must reject the former article for practically the same reason for which we rejected 116. Article 83 relates to a suit " upon any other contract to indemnify." If we are right in thinking that the obligation of the principal to indemnify under S. 221 of the Contract Act is not a contract to do so, Article 83 ceases to be applicable. But even if it did apply, there would remain the question as to the starting point, which is, when the plaintiff was actually damnified. Now when is the agent damnified as regards the advances made by him on account of the principal in the course of his agency ? In the absence of a contract to the contrary we think it must be taken that the agent is damnified when he makes the payment. The expenses referred to in Illustrations (*a*) and (*b*) to S. 222 of the Contract Act are recoverable as soon as they are incurred. And if they are recoverable, there is nothing unreasonable in holding that the agent is damnified when they are recoverable

1. (1897) I.L.R. 21 M. 8. 2. (1901) I.L.R. 25 M. 55.

Kandaswami Pillai v. Avayambal.

and that time begins to run at once. It was contended that the agent had a right of retainer, under S. 217, out of all sums received on account of the principal in the business of the agency, of all moneys due to himself in respect of expenses properly incurred. It was also pointed out that the agent, under S. 222 of the Contract Act, had a lien. It is true that the right of retainer and the lien may be enforced long after the expenses have been incurred so long as moneys or the goods of the principal in connection with the agency are held by the agent irrespective of the period that has elapsed since the expenses themselves were incurred. But is that a reason for holding that if the agent is obliged to sue for moneys spent by him in the business of the agency, his right of action is postponed until the termination of the agency? STORY says in S. 350 of his book on *Agency*: "It may be generally stated that an agent may insist upon deducting all his advances, expenses, disbursements, and losses arising in the course of his agency, whenever they are definite and certain, and do not merely sound in damages, from the pecuniary funds in his hands belonging to his principal, by way of recouper, discount, or set-off; or where no such funds exist, he may maintain an action at law, or a bill in equity, as the case may require, for the recovery thereof." The agent is not entitled to wait for the termination of the agency before he makes his claim. And the fact that he has a lien or a right of retainer in the case of claims for recoupment irrespective of the Statute of Limitation is no reason for holding that the Statute itself does not run. *In Spears* v. *Hartly*[1] it was held by *Lord Eldon*, that if by custom and usage of trade, 'a party was entitled to a lien on goods for a general balance, and he got possession of the goods of his debtor, he might hold them till he satisfied the whole demand, even though a part of it was barred by the Statute of Limitation. In *Curwen* v. *Milburn*[2] in which a question arose as to the lien of a solicitor on deeds and documents belonging to the client, for amounts that had become barred, *Lord Justice Cotton* said:—"Statute-barred debts are due though payment of them cannot be enforced by action." The Court of Appeal held that the solicitor had a lien on the documents and that it was the duty of the taxing master to

1. (1798) 6 R. R. 814. 2. (1889) 42 Ch. D. 424.

Kandaswami Pillai v. Vayambal.

tax all the items of the bill without regard to the Statute of Limitation. The existence, therefore, of a right of retainer and of a lien would in no way prevent the operation of the Statute. Is there any rule of law that postpones the agent's claim to the termination of the agency or the general settlement of accounts? The agent has no duty, apart from any special contract, to spend his own moneys in the business of his agency. His expenditure, therefore, of moneys belonging to himself in the business of the agency would be recoverable under S. 70 of the Contract Act. There is nothing to prevent his making his claim for recoupment immediately after he expended his own moneys. It seems to us clear that assuming that Article 83 applied, the plaintiff was damnified when the expenses were incurred, and the suit instituted more than three years from that date would be out of time.

We think, however, that the Courts below were right in applying Article 61 to this case. That relates to a suit for money payable to the plaintiff for money paid to the defendant. It was argued that this article was confined to cases where the defendant was under a legal liability to make a payment. We see no reason for limiting the scope of the article. Cases falling under S. 70 of the Contract Act are certainly covered by the language of this article. In *Sentance* v. *Hawley*[1], where an agent had paid out of his own money for sugar bought by the principal, it was held that the agent might sue the principal for the price as money paid to his use at his request. Applying article 61, we are of opinion that the suit is barred.

The second appeal is dismissed with costs.

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1. (1863) 13 C. B. N. S. 458.